Oct. 21st 1874.

Filed

Submitted

Davis

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~420~~ 80429

WILDER D. FOSTER, ASSIGNEE, ETC., OF ALEXANDER BLAKE, A BANKRUPT, PLAINTIFF IN ERROR,

vs.

JOSEPH H. HACKLEY, CHARLES H. HACKLEY, EDWIN HACKLEY, AND PORTER HACKLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED SEPTEMBER 16, 1872.

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INDEX.

	Original.	Print.
Petition for writ of error	2	1
Writ of error	4	2
Bond	6	2
Citation and service	8	3
Deposition of Wilder D. Foster	11	4
Summons	19	6
Declaration de bene esse	22	7
Bond	27	9
Affidavit	30	11
Defendants' plea	31	11
Stipulation	32	12
Special findings	35	13
Judgment	55	20
Clerk's certificate	56	20

	Original.	Print.
Muspratt, 1860	146	76
Muspratt, 1860	150	80
Nicholson, 1795	144	75
Parnell, 1845	145	76
Piker, 1836	148	79
Pool, 1840	146	77
Practical Mechanics' Journal, 1849	144	75
Siberling, 1860	149	79
Silliman, 1853	148	78
Silliman, 1856	147	78
Spratt, 1853	148	79
Thomas, 1863	149	79
Thomas, 1866	149	79
Thompson, George, patent, October 21, 1856	147	78
re-issue, July 1, 1859	147	78
patent, September 15, 1859	148	79
Ure, 1839	144	75
Ure, 1850	148	78
Ure, 1854	150	80

1 Supreme court of the United States.

WILDER D. FOSTER, ASSIGNEE OF THE ESTATE and effects of Alexander Blake, a bankrupt, under and by virtue of an adjudication in bankruptcy duly made against the said Alexander Blake, in and by the district court of the United States for the western district of Michigan, plaintiff in error,
vs.
CHARLES H. HACKLEY, JOSEPH H. HACKLEY, Porter Hackley, Edwin Hackley, def'ts in error.

Be it remembered that on this 17th day of May, 1872, come the said plaintiff in error by his attorney, J. W. Champlain, and filed his precipe for a writ of error in the above-entitled cause, in the office of the clerk of the circuit court of the United States for the sixth judicial circuit, and western district of Michigan, the copy of which is as follows:

2 Supreme Court of the United States.

WILDER D. FOSTER, ASSIGNEE OF THE ESTATE and effects of Alexander Blake, a bankrupt, under and by virtue of an adjudication in bankruptcy duly made against the said Alexander Blake, in and by the district court of the United States for the western district of Michigan, plaintiff in error,
vs.
CHARLES H. HACKLEY, JOSEPH H. HACKLEY, Edwin Hackley, and Porter Hackley, def't in error.

To the clerk of the circuit court of the United States for the sixth circuit and western district of Michigan:

SIR: The above-named Wilder D. Foster, assignee, &c., plaintiff in error, hereby makes application to you to obtain a writ of error from the said Supreme Court to be directed to the said circuit court to bring up the record in a certain suit lately depending in the said circuit court, wherein the above-named Wilder D. Foster, assignee, &c., of the estate of Alexander Blake, a bankrupt, was plaintiff, and the said Charles
3 H. Hackley, Joseph H. Hackley, Porter Hackley, and Edwin Hackley were defendants in a plea of trover, the said Wilder D. Foster, assignee, &c., complaining that error hath intervened in the said record to his detriment. The judgment was rendered in said cause on the 20th day of December, A. D. 1871. You will please issue said writ in the usual form, and make the same returnable on the first day of the next ensuing term of the said Supreme Court.

J. W. CHAMPLAIN,
Att'y for Pl'ff in error.

Dated May 16th, 1872.

Afterwards, to wit, on the 17th day of May, 1872, the following writ of error, duly allowed by his hon. S. L. Withey, United States district judge for the western district, was issued:

4 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Michigan, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Wilder D. Foster. assignee of the estate and effects of Alexander Blake, a bankrupt, under and by virtue of an adjudication of bankruptcy duly made against the said Alexander Blake, in and by the district court of the western district of Michigan, in bankruptcy, as plaintiff, and Joseph H. Hackley, Charles H. Hackley, Edwin Hackley and Porter Hackley, as defendants in a plea of trover, a manifest error hath happened, to the great damage of the said Wilder D. Foster, assignee of the estate and effects of Alexander Blake, a bankrupt, &c., as
5 by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court the United States of America, in the year of our Lord one thousand eight hundred and seventy-two.

Dated this 17th day of May, A. D. 1872.

ISAAC H. PARRISH,
Clerk of the Circuit Court of the United States,
West. Dist. Mich.

Allowed by—

S. S. WITHEY,
U. S. Dist. Judge.

6 Afterwards, to wit, on the 18th day of May, A. D. 1872, came the said plaintiff in error and filed his bond, which is in the words and figures following, to wit:

Supreme Court of the United States.

WILDER D. FOSTER, ASSIGNEE, &C., OF ALEXander Blake, a bankrupt,
vs.
JOSEPH H. HACKLEY, CHARLES H. HACKLEY, Porter Hackley, and Edwin Hackley.

Know all men by these presents, that we, Wilder D. Foster as principal, and Thomas S. Freeman , as sureties, of the city of Grand Rapids, county of Kent, and State of Michigan, are held and firmly bound unto Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley, of Muskegon, in the county of Muskegon, and State of Michigan, in the sum of five hundred dollars, to be paid to

them, their executors, and administrators. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 17th day of May, A. D. 1872.

7 Whereas the above-named Wilder D. Foster, as assignee of Alexander Blake, a bankrupt, hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the sixth circuit and western district of Michigan:

Now, therefore, the condition of this obligation is such, that if the above-named Wilder D. Foster, assignee of Alexander Blake, a bankrupt, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WILDER D. FOSTER. [L. S.]
THOMAS S. FREEMAN. [L. S.]
[L. S.]

Approved.

S. L. WITHEY,
U. S. Dis't Judge.

Afterwards, to wit, on the 18th day of May, A. D. 1872, a citation, with proof of service endorsed thereon, was filed in the said circuit court clerk's office, the original of which is hereto attached, and is as follows:

8 The United States of America, to Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, & Porter Hackley, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Michigan, wherein Wilder D. Foster, assignee of the estate and effects of Alexander Blake, a bankrupt, under and by virtue of an adjudication of bankruptcy duly made against the said Alexander Blake, in and by the district court of the western district of Michigan in bankruptcy, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Solomon L. Withey, judge of the circuit court of the United States for said district, this seventeenth day of May, in the year of our Lord one thousand eight hundred and seventy-two.

S. L. WITHEY,
Judge of the District Court of the United States for the Western District of Michigan.

9 On this 18th day of May, in the year of our Lord one thousand eight hundred and seventy-two, personally appeared John W. Champlin before me, the subscriber, Isaac H. Parrish, clerk of the United States circuit court for the western district of Michigan, and makes oath that he delivered a true copy of the within citation to Messrs. Eggleston & Kleinhaus, the attorneys for the within-named Joseph H.

Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley, in the suit within named, on the 18th day of May, A. D. 1872, and at the same exhibited to them this original citation.

JOHN W. CHAMPLIN.

Sworn to and subscribed the 18th day of May, A. D. 1872.

ISAAC H. PARRISH, *Clerk.*

10 To the Supreme Court of the United States:

In pursuance of the foregoing, I, Isaac H. Parrish, clerk of the circuit court of the United States for the sixth judicial circuit and western district of Michigan, do return to the said writ of error as follows: that on the 27th of January, A. D. 1870, the plantiff in the above suit caused to be issued against the defendants a writ of capias ad respondendum, with an affidavit attached, which are in the words and figures following, to wit:

11 In the circuit court of the United States for the sixth circuit and western district of Michigan.

WESTERN DISTRICT OF MICHIGAN, *ss:*

WILDER D. FOSTER, of the city of Grand Rapids and said district, being duly sworn, deposes and says, that one Alexander Blake, of the city of Grand Rapids in said district, was, by an adjudication of the district court of the United States for the western district of Michigan, on the 10th day of June, A. D. 1868, duly declared a bankrupt upon the petition of Leonard H. Randall and Thomas S. Freeman, creditors of the said Blake; that on the 25th day of June, A. D. 1868, this deponent was, by the creditors of the said Blake, duly appointed assignee of the estate of said Alexander Blake, bankrupt, under and by virtue of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867; that this deponent duly accepted such appointment, and has given the required notice thereof, and has received from the Hon. H. E. Thompson, one of the registers in bankruptcy of said district court, before whom said matter was pending, the proper and usual assignment of all the estate, real and personal, of the said Alexander Blake, bankrupt as aforesaid, including all the property of whatever kind, of which
12 said Blake is possessed, or in which he was interested or entitled to have, on the 2nd day of June, A. D. 1868, with all his deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of said assignment by the provisions of the 14th section of said act.

This deponent further saith that on or about the 27th day of May, A. D. 1868, the said Alexander Blake was the owner of valuable personal property, consisting of a general assortment of dry-goods, groceries, boots & shoes, hats and caps, and such articles as are generally kept in a retail store, of great value, to wit, of the value of ten thousand dollars; which said goods were in said Blake's store at the time aforesaid, in the village of Newaygo, Newaygo County, Michigan. Deponent further says that said Alexander Blake, at and previous to the time last aforesaid, was extensively engaged in lumbering at and along the Muskegon river and its tributaries, and was the owner of a saw-mill at Newaygo aforesaid, at which large quantities of lumber were manufactured and rafted, and run th'nce down the Muskegon River to Muskegon Lake, and thence transport-

ed to market; that on the day and year last aforesaid, the said Blake owned a large quantity of pine lumber, situated at the head of Muskegon Lake aforesaid, viz: two hundred and sixty thousand feet of pine lum-
13 ber and forty thousand feet of oak lumber of great value, to wit, of the value three thousand dollars. Deponent further says that on the day and year aforesaid the said Alexander Blake was the owner of large quantities of saw-logs in the waters of Muskegon River and Lake, marked with one of the following marks: #NKADW.8; and he further says that the said Alexander Blake, on the day and year last aforesaid, was the owner of ten horses of great value, to wit, of the value of fifteen hundred dollars; six yoke of oxen, of the value of, to wit, of twelve hundred dollars; five logging trucks of, to wit, the value of five hundred dollars; a large quantity of log-chains, ox-yokes, blacksmiths' and carpenters' tools, belts and belting, saw-mill irons and saws, of great value, to wit, of the value of one thousand dollars; three lumber wagons, of the value of, to wit, of three hundred dollars; one buck-board, of the value, to wit, of thirty dollars; a quantity of beds and bedding, of the value, to wit, of three hundred dollars; a large number of axes, cant-hooks, knives and forks, and dishes, kettes, &c., of great value, to wit, of one hundred dollars.

Deponent further says that on the day and year last aforesaid,
14 the said Alexander Blake was indebted to different persons, as will more fully appear by reference to the files of said district court, to more than the sum of sixty-two thousand dollars.

And deponent fu'ther says that he is informed and believes that on the day and year last aforesaid, Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley, composing the firm of Hackley and Sons, copartners doing business at Muskegon in said circuit and district, were creditors of the said Alexander Blake, and that on the day and year last aforesaid, the said Alexander Blake, being insolvent, and in contemplation of insolvency, with a view to give a preference to said firm of Hackley and Sons, having a claim against him, made a transfer and conveyance of all his personal property, by a bill of sale absolutely to said firm of Hackley and Sons, who then and there received the same. And deponent fu'ther says that said firm of Hackley and Sons, at the time of so receiving the said conveyance, had reasonable cause to believe that said Alexander Blake was insolvent, and that such conveyances were made in fraud of provisions of
15 the act aforesaid. Deponent further says that on the day and year last aforesaid, and cotemporaneously with the making of said bill of sale, the said Alexander Blake, with a view to give a preference to said firm of Hackley and Sons, who had a claim against him, made conveyance by warranty deed of part of the real estate of said Alexander Blake to said firm of Hackley and Sons, and also gave to Charles H. Hackley, one of the members of said firm, a power of attorney to sell and dispose of all his real estate in Michigan.

And deponent says that said firm of Hackley and Sons received said conveyances of said real estate, and that they had reasonable cause to believe that the said Alexander Blake was insolvent at the time thereof, and that such conveyances were made in fraud of the provisions of said act.

Deponent fu'ther says that, on the day and year last aforesaid, the said Alexander Blake being insolvency, or in contemplation of insolvency, or bankruptcy, (which time was within six months before the filing of the petition against him,) made a sale of all his personal property

and a conveyance of part of his real estate, to the firm of Hackley and Sons, which consists of Joseph H. Hackley, Charles H. Hack-
16 ley, Edwin Hackley, & Porter Hackley, of Muskegon, Michigan.

Deponent further says that said firm of Hackley and Sons had, at the time of said sale and conveyance, reasonable cause to believe the said Alexander Blake was insolvent, and to be acting in contemplation of insolvency, and that such sale and conveyance was made with a view to prevent his property from coming to his assignee in bankruptcy, and to prevent the same from being distributed under said act, and to defeat the object of, and to impair, hinder, impede, and delay the operation and effect of, and to evade the provisions of said act. And deponent further says that said sale and conveyance were not made in the usual and ordinary course of business of the said Alexander Blake. And deponent further says that of the goods and chattels of the said Alexander Blake, so sold, conveyed, and assigned by him to the said Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley, copartners as aforesaid, comprising the firm of Hackley and Sons, there were a large quantity of pine saw-logs, marked with one of the following marks,
17 viz: #A.D.N.Y $\overline{\text{W}}$, to wit, eighteen millions six hundred and fifty-seven thousand eight hundred and twenty-five feet board-measure of said logs, of great value, to wit, of the value of ninety-three thousand two hundred and eighty-nine dollars, which said last-mentioned goods and chattels, to wit, the pine saw-logs last above mentioned, they, the said Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley, copartners as aforesaid, comprising the firm of Hackley and Sons, did, on, to wit, the third day of July, in the year eighteen hundred and sixty-eight, at, to wit, Muskegon, in the said western district of Michigan, unlawfully convert to their own use. And deponent further says that the said Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley, copartners as aforesaid, comprising the firm of Hackley and Sons, did afterwards, to wit, on various days and times, thence, hitherto, at the district aforesaid, saw said pine saw-logs last above mentioned into lumber, which said last-mentioned lumber was of great value, to wit, of the value of one hundred and fifty thousand dollars, then and there convert the lumber into which said last-mentioned pine saw-logs was manufactured to their own use,
18 against the just rights of this deponent as assignee as aforesaid, to the damage of this deponent as assignee as aforesaid, of one hundred thousand dollars.

Defendant makes this affidavit for the purpose of procuring the said Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Peter Hackley, being held to bail to answer deponent as assignee as aforesaid, for the damages he has sustained, as herein before stated.

WILDER D. FOSTER.

Subscribed and sworn*ed* to before me, this 27th day of January, A. D. 1870.

ISAAC H. PARISH, *Clerk.*

19 Circuit court of the United States of America for the sixth circuit and western district of Michigan.

The President of the United States of America, to the marshall of the western district of Michigan, greeting:

You are hereby commanded that you take Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley, if they shall be found

in your district, and them safely keep, so that you may have their bodies in the circuit court of the United States of America for the western district, of Michigan, to be held in the city of Grand Rapids, in the said district before the judges of the said court, on the seventh day of February next, to answer unto Wilder D. Foster, assignee of the estate and effect of Alexander Blake, a bankrupt under and by virtue of an adjudication of bankruptcy duly made against the said Alexander Blake, in and by the district court of the United States for the western district of Michigan, in bankruptcy, and also, to a bill &c., for unlawfully converting of the goods and chattels of the said Wilden D. Foster, assignee of the estate and effects, Alexander Blake, a bankrupt under the
20 provisions of an act Congress, *of Congress*, entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved March 3, 1867, to the damage of the said Wilder D. Foster, assignee as aforesaid, one hundred thousand dollars, and have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-seventh day of January, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fourth.

[L. S.] ISAAC H. PARISH, *Clerk.*

GEO. GRAY, *Att'y for Pl'ff.*

Let the defendants in this cause upon the affidavit annexed to this writ give bail in the sum of fifty thousand dollars.

January 27th, 1872.

S. L. WITHEY,
U. S. Dist. Judge.

Afterwards, to wit, on the 31st day of January, A. D. 1870, the said above writ was returned and filed by the United States marshal with said return thereon endorsed as follows:

21 WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify, and return, that I arrested the within-named defendants, on the 28th day of January, A. D. 1870, and I further return that I have released them from my custody, they having first executed their bond in the sum of fifty thousand dollars with James McGordon & Levi Truesdall, as sureties.

JAMES HENRY,
U. S. Marshal.
By LEONARD CORELL,
Deputy.

Afterwards, to wit, on the 23rd day of February, A. D. 1870, the defendant appeared and filed his declaration de bene esse, which is in the words and figures following, to wit:

22 In the circuit court if the United States for the sixth circuit and western district of Michigan, of the October term of said court, to wit, the 7th day of February, A. D. 1870.

WESTERN DISTRICT OF MICHIGAN, *ss:*

Wilder D. Foster, assignee of the estate & effects of Alexander Blake, a bankrupt under & by virtue of an adjudication of bankruptcy duly

made against the said Alexander Blake, in and by the district court of the United States for the western district of Michigan, in bankruptcy, plaintiff in this suit, by George Gray, his attorney, complains of Charles H. Hackley, Joseph H. Hackley, Edwin Hackley & Porter Hackley, being in custody &c., of a plea of trespass on the case.

For that whereas the said Alexander Blake, before he became a bankrupt, to wit, on the 26th day of May, A. D. 1868, at the western district of Michigan, was lawfully possessed as of his own property of certain goods and chattels, to wit, eighteen million feet of pine saw-logs, board measure, marked with one of the following marks #NYQD of great value, to wit, of the value of one hundred thousand dollars, and being so possessed thereof the said Alexander Blake, afterwards and before he became a bankrupt, to wit, on the day and year last
23 aforesaid, at the western district of Michigan, aforesaid, casually lost said goods & chattels out of his possession, and the same afterwards, to wit, on the day and year aforesaid, then came to the possession of the said Joseph H. Hackley, Charles H. Hackley, & Edwin Hackley, & Porter Hackley, co-partners doing business under the name & style of Hackley & Sons, by finding. Yet the same defendants well knowing the said goods & chattels to be the property of the said Alexander Blake, before he became a bankrupt, & of right to belong & appertain to the said plaintiff, as assignee as aforesaid, after the said bankruptcy, but contriving and fraudulently intending to injure the said Alexander Blake, before he became a bankrupt, and the said plaintiff, as assignee as aforesaid, since the said bankruptcy in this behalf, hath not, although often requested so to do, delivered to them, or either of them, the said goods & chattels, or any part thereof, but hath hitherto neglected & refused so to do, and afterwards & since the said bankruptcy, to wit, on the 3rd day of July, A. D. 1868, converted and disposed thereof to their own use, to wit, at the western district of Michigan, aforesaid, to the damage of the said plaintiff, one hundred thousand dollars.

And whereas, also, the said Alexander Blake, before he became a bankrupt, to wit, on the 2nd day of June, A. D. 1868, at the western district of Michigan, was lawfully possessed as of his own prop-
24 erty of certain other goods & chattels, to wit, one million feet of pine lumber, board-measure, manufactured from certain pine saw-logs of the said Alexander Blake, marked #N.Y.Q.D. and, to wit, one hundred thousand lath, manufactured from said logs, all of said goods & chattels of great value, to wit, fifteen thousand dollars, and being so possessed thereof, the said Alexander Blake, afterwards, and before he became a bankrupt, to wit, on the day & year last aforesaid, at the western district of Michigan aforesaid, casually lost the said goods & chattels out of his possession, and the same afterwards, to wit, on the day & year aforesaid, then came to the possession of the said defendants Joseph H. Hackley, Charles H. Hackley, Edwin Hackley & Porter Hackley, copartners doing business in the firm name of Hackley & Sons, by finding. Yet the said defendants, well knowing the said goods & chattels to be the property of the said Alexander Blake, before he became a bankrupt, and of right to belong & appertain to the said plaintiff as assignee as aforesaid, after the said bankruptcy, but contriving & fraudulently intending to injure the said Alexander Blake, before he became a bankrupt, and the said plaintiff as assigneee, as aforesaid, since the said bankruptcy in this behalf, hath not, although often requested so to do, as yet delivered to them, or either of them, the said goods & chattels, or either or any part thereof, but hath hitherto wholly neglected &

refused so to do, & afterwards, and since the said bankruptcy, to wit, on the 3rd day of July, A. D. 1868, converted and disposed thereof to their own use, to wit, at the western district of Michigan aforesaid, and to plaintiff's damage, one hundred thousand dollars.

And whereas also the said plaintiff, as such assignee as aforesaid, after the said Alexander Blake became a bankrupt, to wit, on the 1st day of January, A. D. 1870, at the western district of Michigan aforesaid, was lawfully possessed of certain other goods and chattels, to wit, Eighteen millions feet, board-measure, of pine lumber, manufactured from logs, marked with one of the following marks #NYQD of great value, to wit, of the value of one hundred and fifty thousand dollars, and to wit, eight millions lath manufactured from said logs, of great value, to wit, of the value of thirty thousand dollars, as of the property of the said plaintiff, as such assignee as aforesaid, & being so possessed thereof, the said plaintiff, to wit, on the day & year last aforesaid, at the western district of Michigan aforesaid, casually lost the last-mentioned goods & chattels out of his possession; and the same, afterwards, to wit on the day & year last aforesaid, at the western district of Michigan aforesaid, came to the possession of the said defendants, Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, & Porter Hackley, co-partners, doing business in the firm-name of Hackley & Sons, by finding; yet, the said defendants, well knowing the said last-
26 mentioned goods and chattels to be the property of the said plaintiff, as such assignee as aforesaid, and of right to belong & appertain to him as such assignee as aforesaid, but contriving & fraudulently intending to injure the said plaintiff, as such assignee as aforesaid in this benalf, hath not, although often requested so to do, delivered the said goods or chattels, or any or either of them, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do; and afterwards, to wit, on the day & year last aforesaid, at the western district of Michigan aforesaid, converted & disposed thereof, to their own use, to the damage of the said plaintiff, one hundred thousand dollars, and therefore he brings suit, &c.

GEO. GRAY,
Atty for Plff.

27 Afterwards, to wit, on the 15th day of March, 1870, the said defendant filed special bail, which is as follows:

UNITED STATES OF AMERICA:

In the circuit court of the United States for the sixth circuit & western district of Michigan.

JOSEPH H. HACKLEY, CHARLES H. HACKLEY, Edwin Hackley, & Porter Hackley, defendants,
ads
WILDER D. FOSTER, ASSIGNEE OF THE estate & effects of Alexander Blake, a bankrupt, under and by virtue of an adjudication of bankruptcy duly made against the said Alexander Blake, in and by the district court of the United States for the western district of Michigan, in bankruptcy, plaintiff. } Trover.

made against the said Alexander Blake, in and by the district court of the United States for the western district of Michigan, in bankruptcy, plaintiff in this suit, by George Gray, his attorney, complains of Charles H. Hackley, Joseph H. Hackley, Edwin Hackley & Porter Hackley, being in custody &c., of a plea of trespass on the case.

For that whereas the said Alexander Blake, before he became a bankrupt, to wit, on the 26th day of May, A. D. 1868, at the western district of Michigan, was lawfully possessed as of his own property of certain goods and chattels, to wit, eighteen million feet of pine saw-logs, board measure, marked with one of the following marks #N Y Q D of great value, to wit, of the value of one hundred thousand dollars, and being so possessed thereof the said Alexander Blake, afterwards and before he became a bankrupt, to wit, on the day and year last
23 aforesaid, at the western district of Michigan, aforesaid, casually lost said goods & chattels out of his possession, and the same afterwards, to wit, on the day and year aforesaid, then came to the possession of the said Joseph H. Hackley, Charles H. Hackley, & Edwin Hackley, & Porter Hackley, co-partners doing business under the name & style of Hackley & Sons, by finding. Yet the same defendants well knowing the said goods & chattels to be the property of the said Alexander Blake, before he became a bankrupt, & of right to belong & appertain to the said plaintiff, as assignee as aforesaid, after the said bankruptcy, but contriving and fraudulently intending to injure the said Alexander Blake, before he became a bankrupt, and the said plaintiff, as assignee as aforesaid, since the said bankruptcy in this behalf, hath not, although often requested so to do, delivered to them, or either of them, the said goods & chattels, or any part thereof, but hath hitherto neglected & refused so to do, and afterwards & since the said bankruptcy, to wit, on the 3rd day of July, A. D. 1868, converted and disposed thereof to their own use, to wit, at the western district of Michigan, aforesaid, to the damage of the said plaintiff, one hundred thousand dollars.

And whereas, also, the said Alexander Blake, before he became a bankrupt, to wit, on the 2nd day of June, A. D. 1868, at the western district of Michigan, was lawfully possessed as of his own prop-
24 erty of certain other goods & chattels, to wit, one million feet of pine lumber, board-measure, manufactured from certain pine saw-logs of the said Alexander Blake, marked #N.Y.Q.D. and, to wit, one hundred thousand lath, manufactured from said logs, all of said goods & chattels of great value, to wit, fifteen thousand dollars, and being so possessed thereof, the said Alexander Blake, afterwards, and before he became a bankrupt, to wit, on the day & year last aforesaid, at the western district of Michigan aforesaid, casually lost the said goods & chattels out of his possession, and the same afterwards, to wit, on the day & year aforesaid, then came to the possession of the said defendants Joseph H. Hackley, Charles H. Hackley, Edwin Hackley & Porter Hackley, copartners doing business in the firm name of Hackley & Sons, by finding. Yet the said defendants, well knowing the said goods & chattels to be the property of the said Alexander Blake, before he became a bankrupt, and of right to belong & appertain to the said plaintiff as assignee as aforesaid, after the said bankruptcy, but contriving & fraudulently intending to injure the said Alexander Blake, before he became a bankrupt, and the said plaintiff as assigneee, as aforesaid, since the said bankruptcy in this behalf, hath not, although often requested so to do, as yet delivered to them, or either of them, the said goods & chattels, or either or any part thereof, but hath hitherto wholly neglected &

25 refused so to do, & afterwards, and since the said bankruptcy, to wit, on the 3rd day of July, A. D. 1868, converted and disposed thereof to their own use, to wit, at the western district of Michigan aforesaid, and to plaintiff's damage, one hundred thousand dollars.

And whereas also the said plaintiff, as such assignee as aforesaid, after the said Alexander Blake became a bankrupt, to wit, on the 1st day of January, A. D. 1870, at the western district of Michigan aforesaid, was lawfully possessed of certain other goods and chattels, to wit, Eighteen millions feet, board-measure, of pine lumber, manufactured from logs, marked with one of the following marks #NYQD of great value, to wit, of the value of one hundred and fifty thousand dollars, and to wit, eight millions lath manufactured from said logs, of great value, to wit, of the value of thirty thousand dollars, as of the property of the said plaintiff, as such assignee as aforesaid, & being so possessed thereof, the said plaintiff, to wit, on the day & year last aforesaid, at the western district of Michigan aforesaid, casually lost the last-mentioned goods & chattels out of his possession; and the same, afterwards, to wit on the day & year last aforesaid, at the western district of Michigan aforesaid, came to the possession of the said defendants, Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, & Porter Hackley, co-partners, doing business in the firm-name of Hackley & Sons, by finding; yet, the said defendants, well knowing the said last-

26 mentioned goods and chattels to be the property of the said plaintiff, as such assignee as aforesaid, and of right to belong & appertain to him as such assignee as aforesaid, but contriving & fraudulently intending to injure the said plaintiff, as such assignee as aforesaid in this benalf, hath not, although often requested so to do, delivered the said goods or chattels, or any or either of them, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do; and afterwards, to wit, on the day & year last aforesaid, at the western district of Michigan aforesaid, converted & disposed thereof, to their own use, to the damage of the said plaintiff, one hundred thousand dollars, and therefore he brings suit, &c.

GEO. GRAY,
Att'y for Pl'ff.

27 Afterwards, to wit, on the 15th day of March, 1870, the said defendant filed special bail, which is as follows:

UNITED STATES OF AMERICA:

In the circuit court of the United States for the sixth circuit & western district of Michigan.

JOSEPH H. HACKLEY, CHARLES H. HACKLEY, Edwin Hackley, & Porter Hackley, defendants,

ads

WILDER D. FOSTER, ASSIGNEE OF THE ESTATE & effects of Alexander Blake, a bankrupt, under and by virtue of an adjudication of bankruptcy duly made against the said Alexander Blake, in and by the district court of the United States for the western district of Michigan, in bankruptcy, plaintiff. } Trover.

28 WESTERN DISTRICT OF MICHIGAN, *ss:*

Be it remembered, that on this 2nd day of March, in the year of our Lord one thousand eight hundred and seventy, James McGorden and Levi Truesdall, of the county of Muskegon, in said district, personally appeared before me, Holmes A. Pattison, a commissioner of the United States, to take acknowledgment of bail and affidavits in and for said district, and severally acknowledged themselves to owe Wilder D. Foster, assignee of the estate and effects of Alexander Blake, a bankrupt, under and by virtue of an adjudication of bankruptcy, duly made against the said Alexander Blake, in by the district of the United States for the western district of Michigan, in bankruptcy, the above-named plaintiff, the sum of fifty thousand dollars, to be levied upon their several goods and chattels, lands and tenements, upon condition that, if the said Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley, the above-named defendants, shall be condemned in this action at the suit of the said Wilder D. Foster, assignee as aforesaid, the said plaintiff, they, the said Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley, shall pay the costs and condemnation of the court, or render themselves into the custody of the marshal for said western district of Michigan for the same; or, if they fail to do so, that the said James McGorden and Levi
29 Truesdall will pay the costs and condemnation for them.

JAMES McGORDEN. [L. S.]
LEVI TRUESDALL. [L. S.]

Taken and acknowledged the day and year above written before me.

H. A. PATTISON,
U. S. Commissioner Western Dist. Mich.

UNITED STATES OF AMERICA,
Western District of Michigan, ss:

On this 2nd day of March, 1870, personally appeared before me, a United States commissioner for the 6th circuit and western district of Michigan, James McGorden and Levi Truesdall, who being severally duly sworn, severally say that they are worth twenty-five thousand dollars each over and above all debts, liabilities, and exemptions.

H. A. PATTISON,
U. S. Commissioner Western District Michigan.

Afterwards, to wit, on the 12th day of April, A. D. 1870, the plaintiff, by his attorney, George Gray, appeared and endorsed on said bond exceptions as follows:

In the circuit court of the United States for the western district of Michigan.

WESTERN DISTRICT OF MICHIGAN, *ss:*

And now comes the said plaintiff, by Geo. Gray, his attorney, and excepts to the special bail in the within recognizance named, and says they are insufficient and not severally worth the sum of fifty
30 thousand dollars after all their debts are paid.

Dated April 12th, 1870.

GEO. GRAY,
Pl'ff's Att'y.

Afterwards, to wit, on the 20th day of April, A. D. 1870, the defendants filed their affidavit of justification of the above special bail, as follows:

The circuit court of the United States for the western district of Michigan.

WILDER D. FOSTER, ASSIGNEE OF THE ESTATE and effects of Alexander Blake, a bankrupt, under and by virtue of an adjudication of bankruptcy, duly made against the said Alexander Blake, in and by the district court of the United States for the western district of Michigan,
vs.
JOSEPH H. HACKLEY, CHARLES H. HACKLEY, Edwin Hackley, and Porter Hackley.

WESTERN DISTRICT OF MICHIGAN, *ss:*

James McGorden and Levi Truesdall, being severally sworn according to law, severally depose and say that they reside in the city of Muskegon, in the county of Muskegon, in said western district of Michigan, and that they are jointly worth the sum of fifty thousand dol-
31 lars, after all their debts are paid.

JAMES McGORDEN.
LEVI TRUESDALL.

Subscribed and sworn to before me this 9th day of April, A. D. 1870.
H. A. PATTISON,
U. S. Commissioner in and for Western District of Michigan.

Afterwards, to wit, on the 26th day of April, A. D. 1870, the defendants, by their attorneys, appeared and filed their plea, which is as follows:

In the circuit court of the United States for the sixth circuit and western district of Michigan.

WILDER D. FOSTER, ASSIGNEE OF THE ESTATE and effects of Alexander Blake, a bankrupt under and by virtue of an adjudication of bankruptcy, duly made against the said Alexander Blake, in and by the district court of the United States for the western district of Michigan, in bankruptcy, plaintiff,
vs.
JOSEPH H. HACKLEY, CHARLES H. HACKLEY, Edwin Hackley, & Porter Hackley, defendants.

32 And the said Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley, defendants in this suit, by Eggleston and Kleinhaus, their attorneys, come and defend the wrong and injury, when, &c., and say that they are not, nor is either of them guilty of the said supposed grievances above laid to their charge, or

any or either, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against them. And of this they put themselves upon the country; and the said plaintiff doth the like.

EGGLESTON & KLEINHAUS,
Att'ys for Def't.

Afterwards, to wit, on the 7 day of April, 1871, the following stipulations were filed in said cause:

The circuit court of the United States for the western district of Michigan.

WILDER D. FOSTER, ASSIGNEE OF THE ESTATE and effects of Alexander Blake, a bankrupt, pl'ff,
vs.
JOSEPH H. HACKLEY, CHARLES H. HACKLEY, Porter Hackley, & Edwin Hackley, def'ts.

In this cause it is stipulated that John U. Champlain, esq., be substituted as attorney of record on the part of the plaintiff, and in place of Geo. Gray.
Dated April 7th, 1871.

GEO. GRAY, *Pl'ff's Att'y.*

33 UNITED STATES OF AMERICA:

In the circuit court of the United States for the sixth circuit and western district of Michigan.

WILDER D. FOSTER, ASSIGNEE OF THE ESTATE and effects of Alexander Blake, a bankrupt, &c.,
vs.
JOSEPH H. HACKLEY, CHARLES H. HACKLEY, Edwin Hackley, and Porter Hackley, def'ts.

In this cause it is hereby stipulated that the above-entitled cause may be tried before the judge of said court without a jury, the trial thereof by jury being hereby waived. And it is further stipulated that the testimony given in said court between the said parties, in an action of trover, the trial whereof commenced on the 16th day of December, A. D. 1868, and terminated the 6th day of January, A. D. 1869, on said trial, as evidenced by the copies thereof furnished to the attorneys of the parties in said last-named suit, by the stenographic reporters, who took said testimony, may be read in evidence in the trial of this cause. And it is hereby stipulated that either party may read the whole or any portions of the evidence so taken and furnished by said stenographic reporters, from the copies thereof furnished by said reporters to said attorneys, in evidence on the trial of said cause; and such testimony so read shall be received and have the same effect as evidence in this cause as if said witnesses had testified to the same from the witness-stand on the trial of this cause.

34

And each party is to be at liberty to introduce such other and further testimony as they may see fit on the trial of this cause.

April 7th, 1871.

J. U. CHAMPLAIN,
Pl'ff's Attorney.
EGGLESTON & KLEINHAUS,
Att'ys for Def'ts.

Afterwards, on the 20th day of December, A. D. 1871, the following special findings of the court were filed in said court:

35 United States circuit court, western district of Michigan.

WILDER D. FOSTER, ASSIGNEE, &C., OF THE estate of Alexander Blake, a bankrupt,
vs.
JOSEPH H. HACKLEY, CHARLES H. HACKley, Porter Hackley, and Edwin Hackley.

This cause having been duly submitted to me for trial, and a jury having been waived by the stipulation of parties, heretofore filed, on the seventh day of April, 1871, and the testimony in the cause, and the arguments of counsel therein having been by me heard, and said cause having been duly submitted for my finding, and judgement therein and due consideration having been thereupon had, I do find the facts, as follows:

First. That on the 25th day of January, A. D. 1868, and for several years prior thereto, the defendants were partners—owners of a saw-mill—and engaged in the manufacture of lumber, at Muskegon, in the western district of Michigan, under the firm-name and style of Hackley & Sons.

That, during all the said time, Alexander Blake was engaged in the lumbering business in the western district of Michigan, furnishing logs to be manufactured into lumber, and in connection with said
36 business engaged in merchandising at Newaygo, in said western district.

Second. That, beginning with the winter of 1865 and 1866, and extending down to and including the season of 1867 and 1868, the defendants in this suit and said Alexander Blake had entered into and performed logging contracts with each other.

That, on the 1st day of August, 1867, the said defendants and the said Alexander Blake made and entered into a contract with each other for the furnishing by the said Blake to the said Hackleys of six million feet of pine saw-logs, to be sawed by the defendants at their mill in Muskegon on shares, which said contract was on the fourth day of September, 1867, reduced to writing, and is in the words and figures following, to wit:

"This article of agreement, made and entered into this fourth (4th) day of September, A. D. eighteen hundred and sixty-seven, between Hackley and Sons, of the village of Muskegon, in the county of the same name, and State of Michigan, party of the first part, and Alexander Blake, of the city of Grand Rapids, county of Kent, and State aforesaid, party of the second part, witnesseth, that the said Al-
37 exander Blake, party of the second part, for the considerations hereinafter mentioned, hereby agrees and binds himself, his heirs or assigns, to furnish to the said Hackley and Sons, party of the

first part, to saw on shares, as hereinbefore described, six (6) millions feet, in board-measure, of good, sound, merchantable pine saw-logs, which are to be put into the Muskegon River by the said Alexander Blake during the winter of 1867 and 1868, all of said logs to be selected from good, sound, and thrifty pine, to be long-butted when necessary, so as to be free from butt-shakes, and to otherwise be free from ring-rot or any other defects which would render them unmerchantable in quality; all to be well and properly cut, and not to be cut up into the limbs any further than will make good, sound, merchantable logs, & good common-stuff lumber, and to be cut in such lengths as may be agreed upon from time to time.

"No log to scale less than twelve (12) inches in diameter at the small end by scaling measurement. Each log to be marked with the following marks, to wit, #ADNY stamped on the ends.

"The said party of the second part is to deliver the logs above mentioned at the booms of the Muskegon Booming Company, at Muskegon, free of all expense to the party of the first part, as early in the spring of the coming year 1868 as the main drive of logs of
38 that year shall be delivered at the said booms. The said Hackley & Sons are to pay the cost of rafting up and delivering the said logs at their mill. Any and all other charges that may accrue on said logs are to be paid by the party of the second part.

"The said party of the first part agree to take the within-mentioned logs, to the amount of six (6) millions feet, board-measure, when delivered, as described and agreed herein, and saw the same on shares for one-half (½) of the lumber they produce. All of the lumber manufactured from the above-mentioned logs is to be sent forward to market and sold to the best advantage; the net proceeds of all such sales to be equally divided between the parties to this agreement. Hackley and Sons, party of the first part, agree to advance the said Alexander Blake, party of the second part, the sum of three (3) dollars per thousand feet, board-measure, to enable him to put in the said logs, which said advance is to be paid from time to time in cash, in proportion as the work progresses, it being understood that all money so advanced is to be applied solely to the prosecution of this job, and to no other purpose.

"The said Alexander Blake is to pay interest on all advances made as above at the rate of ten (10) per cent. per annum until paid,
39 said advances, with interest thereon, to be repaid to the said Hackley and Sons from the proceeds of the first lumber sold, all such advances and interest on them to be repaid in full by the first day of November, A. D. eighteen hundred and sixty-eight.

"Right and possession of all the within-mentioned logs and lumber is hereby vested in the said Hackley and Sons as fast as the said logs are cut and banked.

"In witness whereof the parties to this agreement have hereunto set their hands and seals the day and year first above written.

In presence of—

"HACKLEY & SONS.
"ALEXANDER BLAKE."

That, in the latter part of September, A. D. 1867, the said contract was, by the agreement of the parties thereto, changed to ten million feet of logs, and which said change was not reduced to writing; that, in October, 1867, said contract was again changed to fifteen million feet of logs, and which said contract is in the same words and figures as the

one of which a copy is hereinbefore set forth; that, on the 25th day of November, A. D. 1867, it was agreed between said parties that said contract should cover eighteen million feet of logs, and which said last-mentioned contract was, on the 25 day of January, A. D. 1868, reduced to writing and signed by the parties thereto, and which said contract is in the words and figures following:

"This article of agreement, made and entered into this twenty-fifth (25) day of January, A. D. eighteen hundred and sixty-eight, between Hackley and Sons, of the village of Muskegon, in the county of the same name, and State of Michigan, party of the first part, and Alexander Blake, of the city of Grand Rapids, county of Kent, and State aforesaid, party of the second part, witnesseth: That the said Alexander Blake, party of the second part, for the considerations hereinafter mentioned, hereby agrees and binds himself, his heirs or assigns, to furnish to the said Hackley & Sons, party of the first part, to saw on shares, as hereinafter described, eighteen (18) millions feet, in broad-measure of good, sound, merchantable pine saw-logs, which are to be put into the Muskegon River by the said Alexander Blake during the winter of 1867 and 1868, all of said logs to be selected from good, sound, and thrifty pine, to be long-butted when necessary, so as to be free from butt-shakes & to otherwise be free from ring-rot or any other defects which would render them unmerchantable in quality; all to be well and properly cut, and not to be cut up into the limbs any further than will make good, sound, merchantable logs and good common-stuff lumber, and to be cut in such lengths as may be agreed upon from time to time; no log to scale less than twelve (12) inches in diameter at the small end by scaling measurement; all logs to be marked with one of the following marks, to wit, #.D.HY stamped at the ends. The said party of the second part is to deliver the above-mentioned logs at the booms of the Muskegon Boom Co., at Muskegon, free of all expense to the party of the first part as early in the spring of the year 1868 as the main drive of logs of that year shall be delivered at the said booms. The said Hackley & Sons are to pay the cost of rafting up and delivering the said logs at their mill. Any and all other charges that may accrue on said logs are to be paid by the party of the second part. The said party of the first part agree to take the within-mentioned logs to the amount of eighteen (18) millions feet, board-measure, when delivered as described and agreed herein, and saw the same on shares for one-half (½) of the lumber they produce. All of the lumber manufactured from the within-mentioned logs is to be sent forward to market, and sold to the best advantage; the net proceeds of all such sales to be equally divided between the parties to this agreement. Hackley and Sons, party of the first part, agree to advance the said Alexander Blake, party of the second part, the sum of four (4) dollars per thousand feet, broad-measure, to enable him to put in the said logs, which said advance is to be paid from time to time in cash in proportion as the work progresses, it being understood that all money so advanced is to be applied solely to the prosecution of this job, and to no other purpose. The said Alexander Blake is to pay interest on all advances made as above at the rate of ten (10%) per cent. per annum until paid, said advances, with interest thereon, to be repaid to the said Hackley & Sons from the proceeds of the first lumber sold. And the said Alexander Blake has, for the purpose of securing payment of said advances and the interest thereof, granted, bargained, and sold, and by these presents does grant, bargain, and sell unto the said Hackley &

Sons all the following personal property, to wit, all the pine saw-logs bearing the marks #. A.D.M.Y. before mentioned, which said logs are now, part of them, in Muskegon River and on the bank of said river and in the woods where the same were cut, and same are now being cut and marked as aforesaid. All of said logs are in the counties of Newaygo and Mecosta, which said above-described property, at the date of these presents, is free and clear of all liens, conveyances, incumbrances, and levies; and for a valuable consideration I hereby warrant the above representations to be true, to have and to hold the same forever: provided always, and the condition of these presents is such that, if the said Alexander Blake shall pay or cause to be paid to the said Hackley &
43 Sons the advances aforesaid, with the interest, on or before the first day of December, A. D. 1868, then this to be of no effect. And the said Hackley & Sons shall be deemed to be in possession of said pine saw-logs, and the right of possession is hereby vested in them until the said sum of money shall become due and paid as aforesaid.

"In witness whereof the parties to this agreement have hereunto set their hands and seals the day and year first above written.

"HACKLEY & SONS. [L. S.]
"ALEX. BLAKE. [L. S.]

"In presence of—
"PORTER HACKLEY.
"JAMES MCGORDON."

Third. That, under said contracts and in the performance and execution thereof upon their part, the said defendants advanced to the said Alexander Blake, between the said first day of August, 1867, and the 25th day of January, 1868, the sum of forty-one thousand and sixty-six dollars and eighty-six cents; that, at the time said contract was made, there was a balance due from said Alexander Blake to the said defendants and the firm of Hackley & McGordon of twenty-one thou-
44 sand six hundred and sixty-nine dollars and sixty-three cents on account of advances made said Blake on logging contract for the preceding year, and which, on the settlement of the accounts between said defendants and said Blake, on the 1 day of January, 1868, was incorporated in the account of said Blake with said defendants for that season and charged up against said Blake; and that a statement of said account, showing said charge, was forwarded by mail by said defendants to said Blake; and that between the said 25 day of January, 1868, and the 25th day of May, 1868, the said defendants advanced to said Alexander Blake, under said contracts and in the performance and execution thereof on their part, the further and additional sum of fifteen thousand one hundred and eighty-four dollars and eighty-nine cents.

Fourth. That the said Alexander Blake banked and put into the Muskegon River, under said contract, before the 25th day of May, 1868, thirteen millions seven hundred and ninety-nine thousand two hundred and forty-four feet of logs, which were received and manufactured
45 into lumber by the said defendants during the year 1868.

That up to said twenty-fifth day of May there had been manufactured from said logs, by said defendants, under said contract, and shipped by them to the city of Chicago, and there sold, four millions feet of lumber.

That the entire amount of said logs was by said defendants manufactured into lumber and sold by them, or their agents, in the city of Chi-

cago, and the proceeds thereof applied to their own use, and that the total amount realized by them from the sale of said lumber was the sum of one hundred and twenty-six thousand four hundred and eight dollars and sixteen cents.

Fifth. That during the season of 1868, and before the 25 day of May, 1868, the price of lumber had largely declined in the Chicago market; that on or about the 25th day of May, 1868, the said Alexander Blake informed the said defendants that he would be unable to pay his debts, and must stop, and proposed to make an assignment; that the defendants objected to said Blake making an assignment, but advised
46 and requested him to make a bill of sale of his property to them, to which the said Blake assented. That thereupon said defendants and the said Blake estimated the quantity of logs not then manufactured at fourteen million feet; places an estimate upon the then value of the logs covered by said contract; figured up the amount of advances that had been made thereon; and said Blake then sold and conveyed to the defendants certain real and personal property, comprising nearly if not quite all the property of which the said Alexander Blake was at that time possessed, and did, among other instruments, make, execute, and deliver to the said defendants a certain bill of sale, in the words and figures following, to wit:

"Know all men by these presents, that Alexander Blake, of the city of Grand Rapids, in the county of Kent and State of Michigan, of the first part, for and in consideration of the sum of fifty-five thousand dollars, lawful money of the United States, to be paid by Hackley and Sons, of Muskegon, Muskegon County, Michigan, of the second part, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents does grant and convey, unto the said parties of the second part, their executors, administrators, or assigns, all the fol-
47 lowing-described property, to wit: Five hundred thousand feet of lumber, now on the dock of A. U. Man & Co., and also on the dock of Geo. Ames, both of said docks being in Muskegon Lake, said lumber being manufactured from logs marked thus: #.A.D.M.Y. with marking-hammer on the end. Also fourteen millions feet of pine saw-logs, stamped on the end with marking-hammer thus: #NY.AD.M now in Muskegon River on railways, in the booms of the Muskegon Booming Company, and in the mill-booms of A. U. Man & Co., & George Ames, in Muskegon Lake. Also twelve rafts of pine-lumber, now lying in George Ames' boom, in said Muskegon Lake, supposed to contain about two hundred and twenty-five thousand feet of lumber; also about twenty thousand feet of oak lumber on said rafts of pine-lumber, and on the said dock of George Ames; also all the stock of goods now in the store & barn near the same, now and heretofore occupied and used by me at the village of Newaygo, in the county of Newaygo and State of Michigan, said stock of goods being composed of dry goods, groceries, boots and shoes, hats and caps, clothing, hardward, wooden ware, cordage, &c., and including all goods, of whatever name or nature, in and about said store belonging to me. Also all of the lumber, of whatever
48 kind, in and about the water saw-mill and premises owned by me at Newaygo aforesaid; also all tools, implements, fixtures, apparatus, machinery, or other personal property used in and about the running of the said water saw-mill at Newaygo aforesaid, so owned and occupied by me as aforesaid; also all other tools or material for use in and around said mill belonging to me. Also all the blacksmith-tools in

and about the blacksmith-shop owned and occupied by me at Newaygo aforesaid; also all the coal, iron, or other material in and about said shop belonging to me; also four span of horses, two of said span being chestnut-colored with white face, both geldings, and one being a span of dark-bay geldings and the other a span of large mares, one a cream-color and the other bay; also one horse of brown color, known by the name of Sam; also one large bay horse; also four sets of double harness, used on said span of horses; and all whiffletrees, double-trees, and neck-yokes used with said horses; also one single harness; also three double wagons, two of them new and one used about one year; also one buck-board wagon; also eight set of trucks; also thirty-six set of logging-sleighs; also eight yoke of oxen and one two-year old steer; also all yokes and chains used with said oxen; all of said prop-
49 erty being at Newaygo aforesaid and now in my possession. Also all bedding, crockery, furniture, and other personal property used in and about the logging-shanty, on the north side of Muskegon River, belonging to me; also all the bedding, crockery, & furniture and other personal property at the logging-shanty on the south side of said river, on sec. 30, in town. No. twelve (12) north of range No. twelve (12) west, in the State of Michigan, belonging to me; also ten cross-cut saws and twenty axes; also one large saw, now at said shanty on the south side of said river, belonging to me and now in my possession at the place aforesaid. To have and to hold the same unto the said parties of the second part, their executors, administrators, and assigns forever. And the said party of the first part, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said parties of the second part, their executors, administrators, and assigns, to warrant and defend the sale of the said property, goods, & chattels, hereby made unto the said parties of the second part, their executors, administrators, and assigns, against all and every person or persons whatsoever.

"In witness whereof I have hereunto set my hand and seal this
50 twenty-fifth day of May, one thousand eight hundred & sixty-eight.
"ALEXANDER BLAKE. [L. S.]

"Signed, sealed, and delivered in presence of—
"EDWIN POTTER."

That the value of the personal property and from the logs mentioned in said bill of sale exceeded sixteen thousand dollars and the real estate at that time conveyed was of large value, and that the consideration for said conveyances and transfers was the indebtedness at that time owing from Blake to the defendants. That, for the value of said personal property received by the defendants aside from the logs and lumber in controversy in this suit, a judgement was rendered against them at the suit of the plaintiffs herein for the sum of $15,507.11, and all said personal property not embraced in said suit, and said real estate has since been conveyed by said defendants to the plaintiff herein as assignee. That said logs, on the 25th day of May, 1868, were in the Muskegon River between Croton & the Muskegon Company & booms, and in said booms.

Sixth. That, at the time of the execution and delivery of said bill of sale, no agreement was made or entered into for the cancellation
51 or surrender of the said contract of January 25, 1868, nor was the same surrendered or delivered up by the defendants to the said Blake, but the defendants retained and held the same. That, after

the execution and delivery of the said bill of sale, as aforesaid, the defendants ceased to sell the lumber manufactured from the logs furnished under said contract on the joint account of themselves and the said Blake, but sold the same on their own account alone. That the defendants, immediately after the execution of said bill of sale, claimed to the creditors of said Blake and other persons to be the absolute owners of the property so transferred & conveyed.

Seventh. That, on the 25th day of May, 1868, the said Alexander Blake was indebted to different persons, exceeding in the aggregate one hundred thousand dollars, exclusive of any indebtedness to the defendant; that on that day he was insolvent, and the defendants were creditors of said Blake in the sum of about sixty-three thousand dollars, and with a view to give said defendants a preference, the said Blake, *in the sum of about sixty-three thousand dollars, and with a view to give*
52 *said defendants a preference, the said Blake,* on the day aforesaid, transfer'd and conveyed to the said defendants all of his personal property and real estate, including said logs, which had not been manufactured at that date mentioned in the said contract of date January 25, 1868, and the defendants, when they received said transfers and conveyances, had reasonable cause to believe that said Blake was insolvent, and that said transfers and conveyances were made in fraud of the provision of an act of Congress entitled "An act to provide for a uniform system of bankruptcy throughout the United States," approved March 2, 1867; and that said transfers and conveyances were made by the said Blake to the defendants with the intent to hinder, delay, and defraud the creditors of the said Alexander Blake, and the said defendants, when they received said transfers and conveyances, had reasonable cause to believe that a fraud on said bankrupt act was intended, and that said Blake was insolvent.

Eighth. That, on the second day of June, A. D. 1868, a petition was filed in the United States district court for the western district of
53 Michigan by Leonard H. Randall and Thomas S. Freeman, on behalf of themselves as creditors of said Blake, praying that the said Alexander Blake be declared a bankrupt. That such proceedings were thereupon afterwards had that, on the tenth day of June, A. D. 1868, the said Alexander Blake was declared a bankrupt, and on the 25th day of June, 1868, the plaintiff Wilder D. Foster was duly appointed assignee of the estate of said Blake, and duly qualified as such.

That as such assignee the said plaintiff, before the commencement of this suit, demanded from the said defendants the logs described in said contract, and the lumber manufactured therefrom. Upon the facts as above found I hold and find the law to be—

2. That the various contracts, made and entered into between the defendants and Alexander Blake, as hereinbefore stated and set forth, were merged in the contract, bearing date January 25, 1868.

That the defendants acquired an interest in and lein upon the logs furnished them by Blake, to the extent of the amount of the advances made by them during that season, and that said defendants' lein is not limited in its extent to the amount of advances made subsequent
54 the said 25th day of January, 1868, but embraces the whole amount advanced by them to Blake to enable him to put in the logs which were furnished them that season.

2. That the rights and interests of the defendants in said logs and the lumber manufactured therefrom were not affected or impaired by the bill of sale of May 25, 1868; that defendants neither gained or lost any rights because of the said bill of sale of that date; that under the

contract of January 25, 1868, while the logs were in the Booming Company's booms, they were in the defendants' possession, and while they were in good faith proceeding, on their part, to execute and carry out the contract, the defendants had the right to saw those logs into lumber and could not be divested, either by Blake or his assignee, of the right to take possession either of the logs or lumber manufactured therefrom, and that the plaintiff, by virtue of his appointment as assignee, acquired no greater rights or interests in said logs than Blake himself possessed, and that the defendants are entitled to judgement.

Let judgement be entered accordingly.

SOLOMON L. WITHEY.

DECEMBER 20TH, 1871.

55 At a session of the circuit court of the United States for the sixth judicial circuit and western district of Michigan, continued and held at the city of Grand Rapids on Wednesday, the 20th day of December, in the year of our Lord one thousand eight hundred and seventy-one: Present, the Honorable Solomon L. Withey, district judge.

WILDER D. FOSTER, ASSIGNEE OF THE ESTATE and effects of Alexander Blake, a bankrupt, under and by virtue of an adjudication of bankruptcy duly made against Alexander Blake by the district court of the United States for the western district of Michigan, in bankruptcy,

vs.

JOSEPH H. HACKLEY, CHARLES H. HACKLEY, Porter Hackley, & Edwin Hackley.

In this cause, having heard the proofs and allegations of the parties and arguments of counsel, and due deliberation having been thereupon had, it is considered that the said plaintiff take nothing by his said suit, and that the said defendants do go thereof without day, and it is further considered that the said defendants do recover against the said plaintiff their costs and charges by them, about their defense of this suit to be taxed, and that they have execution thereof.

S. L. WITHEY.

56 WESTERN DISTRICT OF MICHIGAN, *ss:*

I, Isaac H. Parrish, clerk of the circuit court of the United States for the sixth judicial circuit & western district of Michigan, do hereby certify that I have duly compared the above & foregoing records and proceedings in said cause in my office, and the same is a true transcript therefrom and the whole of such originals.

Witness my official signature and the seal of the said circuit court at Grand Rapids this 6th day of August, A. D. 1872.

[SEAL.] ISAAC H. PARRISH, *Clerk.*

(Indorsement on cover:) No. 420. Wilder D. Foster, assignee, &c., of Alexander Blake, a bankrupt, plaintiff in error, vs. Joseph H. Hackley, Charles H. Hackley, Edwin Hackley, and Porter Hackley. W. Michigan C. C. U. S. Filed 16th September, 1872.

IN THE

SUPREME COURT,

OF THE

UNITED STATES.

NOYES L. AVERY, Assignee of
ALEXANDER BLAKE, a Bankrupt,
Plaintiff in Error.

vs.

CHARLES H. HACKLEY, et al,
Defendants in Error.

Error to the Circuit Court of the United States for the Western District of Michigan.

POINTS AND ARGUMENT FOR PLAINTIFFS IN ERROR.

J. W. CHAMPLIN,
Attorney for Plaintiffs.

GRAND RAPIDS, MICH:
DYGERT BROS. & CO. PRINTERS AND BINDERS.
1874.

IN THE

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NOYES L. AVERY, Assignee of
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} Error to the Circuit Court of the United States for the Western District of Michigan.

POINTS AND ARGUMENT FOR PLAINTIFFS IN ERROR.

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GRAND RAPIDS, MICH:
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1874.

UNITED STATES OF AMERICA:

SUPREME COURT,

NOYES L. AVERY, Assignee of
ALEXANDER BLAKE, a Bankrupt,
Plaintiff in Error.

vs.

CHARLES H. HACKLEY, et al,
Defts. in Error.

ACTION OF TROVER.

THE PLEA IS THE GENERAL ISSUE.

Since the record was removed to this Court, *Wilder D. Foster*, the Plaintiff in Error, died, and *Noyes L. Avery* has been admitted as party plaintiff herein; also, *Joseph H. Hackley*, one of the defendants, has, since the record was filed in this Court, died, ~~and his personal representatives have voluntarily come in and been admitted as parties to the suit.~~

Statement of Facts.

The facts found by the Court are briefly as follows :

On the 25th day of January, 1868, and for several years prior, the defendants were partners and owners of a saw-mill, and engaged in the manufacture of lumber, at Muskegon, in the Western District of Michigan.

That *Alexander Blake* was during the same time engaged in the lumbering business, furnishing logs to be manufactured into lumber, and in connection therewith he was also engaged in merchandising at Newaygo, in said Western District.

That beginning with the winter of 1865 and 1866, and extending down to and including the winter of 1867 and 1868, the defendants and said *Blake* had entered into and performed logging contracts with each other.

These contracts were finally embodied in one, bearing date the 25th day of January, 1868, which is set out in full on pages 15 and 16 of the printed record, and as the Court has held that all of the preceding contracts merged in this, I will state briefly the undertakings of the parties to it.

Blake agreed to *furnish* to defendants to saw on shares, eighteen million feet of good, sound, merchantable pine saw-logs, which were to be put into the Muskegon River by *Blake* during the win-

ter of 1867 and 1868. He agreed *to deliver said logs at the booms of the Muskegon Boom Company, at Muskegon, free of all expense to the defendants,* as early in the year 1868 as the main drive of logs of that year should be delivered at said booms. Defendants were to pay the cost of rafting up and *delivering the logs at their mill.* All other charges were to be paid by *Blake.* Defendants agreed to take the logs to the amount of eighteen million feet, *when delivered as described and agreed therein,* and to saw them on shares for one-half the lumber they produced. All lumber manufactured from the logs was to be sent forward to market and sold to the best advantage, the net proceeds to be divided equally between *Blake* and defendants. Defendants agreed to advance *Blake* four dollars a thousand, to enable him to put in the logs, which money was to be applied exclusively to that purpose. *Blake* was to pay interest for such advances at the rate of ten per cent., and the advances and interest were to be repaid to defendants out of the proceeds of the first lumber sold. And for the purpose of securing the advances and interest, *Blake* bargained and sold said logs to defendant, which said logs were then, part of them in the Muskegon River and on the bank of said river, and in the woods where the same were cut, and some were then being cut and marked, and all of the logs were in the Counties of Newaygo and Mecosta. This was to be of no effect if *Blake* should pay or cause to be paid to said defendants, the said advances and interest on or before December 1st, 1868. The defendants were *to be deemed* to be in possession of said pine saw logs, and the right of possesion was by said agreement vested in them until said sum of money should become due and paid.

This mortgage stood as security on the 25th day of May, 1868, for the following advances, viz:

For sums advanced between August 1st, 1867, and January 25th, 1868, - - -	$41,066.86
For sums advanced between January 25th, 1868, and May 25th, 1868, - - - -	15,184.89
Total, - - - - -	$56,251.75

[Record page 16, fo. 44.]

Blake was also indebted to the defendants, Jan. 25th, 1868, in the sum of twenty-one thousand six hundred and sixty-nine dollars and sixty-three cents ($21,669.63, for advances made to *Blake* by *Hackley & McGordon* and defendants, which, on the 31st of January, 1868, was charged in account by defendants to *Blake*, which sum was unsecured.

That *Blake* banked and put into Muskegon River under said contract, before the 25th day of May, 1868, thirteen million seven hundred and ninety-seven thousand, two hundred and forty-four feet of logs, of which amount four million feet had been sawed and shipped by defendants to Chicago, and sold prior to May 25th, 1868.

That on the 25th day of May, 1868, *Blake* was indebted to different persons other than the defendants, exceeding in the aggregate one hundred thousand dollars, and to the defendants about sixty-three thousand dollars. That on that day he was insolvent, and with a view to give to said defendants a preference, he on that day transferred and conveyed to the defendants *all of his personal*

property and real estate, including said logs mentioned in the contract of January 25th, 1868, which had not been manufactured into lumber. That the defendants when they received said transfers and conveyances had reasonable cause to believe that said *Blake* was insolvent, and that said transfers and conveyances were made in fraud of the provisions of the Bankrupt Act, and also that said transfers and conveyances were made by the said *Blake* to the defendants *with the intent to hinder, delay and defraud the creditors of said Blake*, and said defendants when they received said transfers and conveyances, had reasonable cause to believe that a fraud on said Bankrupt Act was intended, and that said *Blake* was insolvent. (Record page 19.)

That on the 2d day of June, 1868, a petition was filed for the purpose of having *Blake* adjudicated a bankrupt, and he was so adjudicated on the 25th day of June, A. D. 1868, and Foster was appointed his assignee, and as such duly qualified, who demanded from the defendants the logs in question and the lumber manufactured therefrom before the commencement of this suit. (Record page 19.)

That one of said transfers and conveyances by which a portion of the personal property was conveyed, including the logs in question in this suit, is fully set out in the record pages 17 and 18, being the bill of sale of May 25th, 1868. That after the execution and delivery of said bill of sale the defendants ceased to sell the lumber manufactured from the logs furnished under said contract on the joint account of themselves and the said *Blake, but sold the same on their own account alone*, and immediately after the execu-

tion of said bill of sale, claimed to the creditors of *Blake* and others, to be the absolute owners of the property so transferred and conveyed. (Record page 19, fo. 51.)

That the entire amount of said logs was by said defendants manufactured into lumber, and sold by them or their agents in the City of Chicago, *and the proceeds thereof applied to their own use,* and that the total amount realized by them from the sale of said lumber, was the sum of one hundred and twenty six thousand four hundred and eighty dollars and 16 cents ($126,480.16). (Record pages 16 and 17, fo. 45.)

That the value of the personal property *aside* from the logs mentioned in the bill of sale *exceeded sixteen thousand dollars,* and the real estate at that time conveyed was of *large value.*

That the consideration for said conveyances and transfers was the indebtedness at that time owing from Blake to the defendants. (Record page 18, fo. 50, where the word "aside" is printed "and.")

That at the time of the execution and delivery of said bill of sale no agreement was made or entered into for the cancellation or surrender of the said contract of January 25th, 1868, nor was the same surrendered or delivered up by the defendants to said *Blake* but the defendants retained and held the same.

The above are the material facts of this case as disclosed by the finding.

Law of the Case.

From the facts found the Court below, found and held the law to be:

1. That the various contracts made and entered into between the defendants and Alexander Blake, as thereinbefore stated and set forth, were merged in the contract bearing date January 25th, 1868. That the defendants acquired an interest in and lien upon the logs furnished them by *Blake* to the extent of the amount of the advances made by them during that season, and that said defendant's lien is not limited in its extent to the amount of the advances made subsequent to the 25th of January, 1868, but embraces the whole amount advanced by them to *Blake* to enable him to put in the logs which were furnished them that season.

2. That the rights and interests of the defendants in said logs, and the lumber manufactured therefrom were not affected or impaired by the bill of sale of May 26th, 1868; that defendants neither gained or lost any rights because of the bill of sale of that date; that under the contract of January 25th, 1868, while the logs were in the Booming Company's booms, they were in the defendant's possession, and while they were in good faith proceeding on their part to execute and carry out the contract, the defendants had the right to saw those logs into lumber, and could not be divested, either by *Blake* or his assignee, of the right to take possession either of the logs or lumber manufactured therefrom, and that the plaintiff, by virtue of his appointment as assignee, acquired no greater rights or interests in said logs than *Blake* himself possessed, and that the defendants are entitled to judgment.

Statement of Errors Relied Upon.

I. The Court erred in holding as matter of law upon the facts found that the rights and interests of the defendants in said logs and lumber manufactured therefrom, were not affected or impaired by the bill of sale of May 25th, 1868.

II. The Court erred in holding the law to be, that the defendants neither gained or lost any rights because of the said bill of sale of that date.

III. The Court erred in holding the law to be, that under the contract of January 25th, 1868, while the logs were in the Booming Company's boom, they were in the defendant's posession, and while they were in good faith proceeding on their part to execute and carry out the contract, the defendants had the right to saw those logs into lumber, and could not be divested, either by *Blake* or his assignee, of the right to take possession, either of the logs or lumber manufactured therefrom.

IV. The Court erred in holding that the plaintiff, by virtue of his appointment as assignee, acquired no greater rights or interests in said logs than *Blake* himself possessed.

V. That the facts found are insufficient to support a judgment in favor of the defendants, but on the contrary, from the facts found the judgment ought to have been for the plaintiff for the value of the lumber.

J. W. CHAMPLIN,
Attorney for the Plaintiff in Error.

Points.

I. The transfers and conveyances made by *Alexander Blake* to the defendants, May 25th, 1868, were valid and binding between the parties to them.

Hagan v. *Walker*, 14 How. R., 34.
Backhouse v. *Jett*, 1 Brock. Marsh., 507.
Odenheimer v. *Hanson*, 4 McLean, 438.
Randall v. *Phillips*, 3 Mason, 388.
Bean v. *Smith*, 2 Mason, 274, 276, 298.
The Lion, 1 Sprague, 40.
Chamberlyne v. *Temple*, 2 Randolph, 384.
Anderson v. *Roberts*, 18 Johns. R. 526.
1 *Story Eq.*, § 353, 371.
Bradshaw v. *Klein*, 2 Biss. R., 20.

II. The consideration for the transfers and conveyances of all of *Blake's* property to the defendants, was his indebtedness to them.

The *effect* of these transfers and conveyances, between the parties was to terminate and extinguish the relation of debtor and creditor, and also their joint operations under the contract of Jan. 25th, 1868.

4th Kent Com. 9th ed., 113.
Jennings v. *Wood*, 20 Ohio R., 264.
Collins v. *Terry*, 7 Johns. R. 278.
Greenough v. *Rolfe*, 4 N. H. Rep., 363.
James v. *Morey*, 2 Cow. R, 246.
Hill v. *Smith*, 2 McLean, 446.

III. The said transfers and conveyances, although valid between the parties thereto, were fraudulent and void as to the creditors of *Alexander Blake*; and the assignee of *Blake* in bankruptcy is entitled to recover the value of the personal property transferred in this action.

And the defendants can not set up the contract of January 25th to defeat plaintiff's right to recover, because that contract has been merged in and extinguished by the new contract of May 25th. And they can not stand on the new contract of May 25th, because it is void as to creditors.

Paine v. *Waite*, 11 Gray, 190.
Cox v. *Wilder*, 5 Nat. Bank Reg., 443.
Bankrupt Act, § 35, 39.
Carr v. *Hilton*, 1 Cur. C. C., 233.

IV. That all the estate and property of the bankrupt, and all his right and title to and interest in property, whether encumbered or unencumbered, are *in custodia legis*, and under the sole and exclusive jurisdiction and control of the Bankruptcy Court, in which the proceedings are had, pending the proceedings. And on the appointment of an assignee, the right and title, together with the right of possession of the property for the purpose of being administered, passes to the assignee.

In re Rosenberg, 2 N. B. R., 33.
Bankrupt Act, § 14.
Davis v. *Anderson*, 6 B. R., 146.
Johnson, Assignee, v. *Bishop, Sheriff*, 1 Woolworth, 334.

V. That the defendants having received the property transferred as a fraudulent preference, and having reasonable cause to believe that a fraud upon the provisions of the Bankrupt Act was intended, and that said *Blake* was insolvent; cannot prove their debt in bankruptcy, nor enforce any lien against the assets of the bankrupt, by which such preferred debt was secured.

Bankrupt Act, § 23, 35, 39.
Phelps v *Sellik*, 8 Nat. B. Reg., 390.
In re Frizelle, 5 Nat. B. Reg., 122.
Bromley v. *Smith*, 5 Nat. B. Reg., 152.
Davis v. *Bittel*, 2 Nat. B. Reg. 125.
In re Richter's Estate, 1 Dil. 544.

VI. The property in question having been conveyed by the bankrupt in fraud of his creditors, became at once vested in the assignee, and passed to him by the assignment in the bankruptcy proceedings, and he was entitled to demand and receive the same, and to bring this suit for the recovery of the value thereof.

Bankrupt Act, § 14, 15.
Goodwin v. *Sharkey*, 2 Nat. B. R., 138.

As to the right to recover the value of the lumber see,

Baker v. *Wheeler & Martin*, 8 Wend., 505.
Silsbury v. *McCoon*, 3 N. Y., 397.
Brown v. *Saxe*, 7 Cow., 95.
Betts v. *Lee*, 5 John. R., 348.
Curtis v. *Grant*, 6 John. 168.
Riddle v. *Driven*, 12 Ala., 590.

Argument.

The attention of the Court is called to the third sub-divsion of the finding, on page 16 of the record, which shows the amounts advanced under the contracts of January 25th, 1868, as follows :

Prior to Jan. 25th, 1868, - - -	$41,066.86
After Jan. 25th, 1868, - - - -	15,184.89
Also *Hackley & McGordon's* acct., charged to *Blake*,	21,669.63
Total, - - - - - -	$77,921.63

But the Court has found as a fact that the amount of the indebtedness from *Blake* to defendants, May 25th, 1868, was about $63,000, which shows that between Jan. 25th and May 25th, 1868, over fourteen thousand dollars had been paid, and the presumption is that it was applied on the mortgage debt, on the familiar principle that where one debt is a mortgage debt and the other a simple account, the Court will apply the money to the mortgage debt in preference (2 Par. on Con., 143.) This would also be in consonance with the fact found on page 16 of the record, fol. 45, that on the 25th of May there had been manufactured and sold by defendants four million feet of lumber, and the contract between the parties provided that the advances should be paid from the proceeds of the first lumber sold.

What were the rights of the parties under the the contract of January 25th, 1868, between the bankrupt and the defendants ? This must be determined by its terms :

1. *Blake* was to put into the Muskegon River and deliver at the booms in the spring as early as the main drive, eighteen million feet of logs of the quality and marks described, to be furnished defendants "to saw on shares."

2. The defendants were to pay the cost of rafting the logs and delivering them at their mill; and all other charges were to be paid by *Blake*.

3. The defendants were to saw the logs on shares for one-half of the lumber they produced.

4. The lumber sawed was to be sent forward to market and the net proceeds of sales to be equally divided.

5. The defendants were to advance from time to time, $4.00 per thousand feet, to be applied exclusively to getting out logs, for which they were to receive ten per cent. interest, which was to be repaid from the proceeds of the first sales.

6. To secure the payment of said advances and interest by Dec. 1st, 1868, the logs already out and to be got out were mortgaged to defendants.

7. The defendants were to be deemed in possession, and to have the right of possession until these advances were paid.

The rights of the parties under this contract were as follows:

a. Independent of the mortgage clause in the contract, the logs remained the sole property of *Blake*.

b. After the delivery of the logs at the boom, the defendants were entitled to the possession of the logs for the purpose of raft-

ing and manufacture—the same possession as any mechanic has of the material placed in his hands, to be worked up into a manufactured article.

c. When manufactured into lumber, and not until then, the the defendants became the joint owners of one-half of the lumber.

d. This joint property was to be sold at joint expense, and the net proceeds of the sales divided.

It is clear that there was no partnership in any part of this transaction.

There was no community of interest in the logs. These, until they were manufactured, were the exclusive property of *Blake*, and were got out at his expense.

There was no community of interest in the profits of the sawing; these profits were embraced in the one-half of the lumber sawed. It was immaterial to *Blake* whether the sawing cost much or little. He neither made or lost by it. He had none of the rights or liabilities of a partner in relation thereto. He could not control the sawing, nor was he liable for the debts contracted therefor. The defendants were simply his employees to do the the sawing at a fixed rate, viz: one half of the lumber sawed.

Nor were they to be partners in the lumber they produced, and in the sale thereof. After it was manufactured they were merely joint owners, with an agreement that the joint property should be disposed of, and the proceeds divided. Neither was the agent of the other to make the sale, and no sale could be made but by joint assent.

The rights of the parties under the contract were, therefore:

1. *Blake* was the sole owner of the logs. This ownership was not transferred to defendants by the chattle mortgage clause. There had been no breach of condition. If there had been, the ownership would not have been transferred to the mortgagee. Says COOLEY J., in *Luckin* v. *Wesson*, 25th Mich. R., 445, "The doctrine that the holder of a mortgage upon chattels becomes absolute owner of the property by breach of condition, is not admitted in this State. The mortgagee has a lien which he may foreclose in the several modes permitted by law, and from which the mortgagor may redeem. The true relation of the parties is that of debtor on the one side, and creditor secured by lien on property upon the other."

2. The defendants were entitled to the possession thereof when delivered at the boom, for the purpose of sawing.

3. The parties were joint owners of the lumber sawed.

4. The defendants had a mortgage upon the logs to secure advances made under the contract.

What effect did the transaction of May 25th have upon the contract of January 25th, and the rights of the parties thereunder?

1. What would have been the effect of the transaction of May 25th, if there had been no creditors of *Blake* other than the defendants, and no proceedings in bankruptcy?

Blake on that day was indebted to *Hackley & Sons* in about the sum of sixty-three thousand dollars. By the bill of sale he

sold to them, together with other property, all the lumber and logs described in the contract of January 25th, and absolutely transferred the title thereto to them. "The consideration for said conveyances and transfers, was the indebtedness at that time owing from *Blake* to the defendants," (Record, page 18, fo. 50.) The very object of the sale was to pay the debt which in part consisted of advances secured upon the logs sold, and by it this debt was discharged.

As between the parties this was a valid transaction, and such as they had a right to make, and they were bound thereby.

Its legal effect was to abrogate the contract of Jan. 25.

The logs, which before were the property of *Blake*, became the property of defendants.

The lumber, which before was the joint property of the parties, became the sole property of the defendants. The property in the logs, which was before conditional, now became absolute in the defendants.

The debt secured by the mortgage was absolutely discharged. The mortgage therefore ceased to exist,

1. By the payment of the debt secured thereby.

2. By the transfer to the mortgagees all of the mortgagor's right and title in the property, so that the absolute title vested in the former.

The fact that at the time of the execution and delivery of the bill of sale, no *agreement* was made or entered into for the cancellation or surrender of the contract of January 25th, and that the same was

not surrendered or delivered up by the defendants, to said *Blake*, but retained and held by the defendants, is unimportant. The fact being found by the Court that after the execution and delivery of the said bill of sale as aforesaid, the defendants ceased to sell the lumber manufactured from the logs furnished under said contract on the joint account of themselves and said *Blake*, but sold the same on their own account alone, and claimed, immediately after the execution of said bill of sale, to the creditors of *Blake* and others, to be the absolute owners of the property so transferred and conveyed. (Record page 19, fo. 51.)

They also sold the lumber manufactured from said logs, and applied the proceeds to their own use. (Record page 17, fo. 45.)

These facts show conclusively that the contract of January 25th was not held by the defendants as a subsisting agreement, the execution of which they were performing, but that it was entirely *abrogated;* and it matters not who held it thereafter, or whether it was actually surrendered or cancelled. It is certain that when the new contracts were entered into on the 25th of May, 1868, which so entirely changed the rights and obligations of these parties, no provision was made for the execution of any of its provisions; indeed, it is impossible to perceive what there was left of the contract of January 25th to execute.

The court below does not find that the defendants' ever did, or ever claimed to carry out the contract of January 25th, after the execution of the bill of sale of May 25th; but does find the facts directly the contrary; and I submit that upon the facts thus found it does not follow s matter of law after the 25th of May, "that

under the contract of January 25, 1868, while the logs were in the Booming Company's booms they were in the defendants' possession, *and while they were in good faith proceeding on their part, to execute and carry out the contract, the defendants had the right to saw those logs into lumber and could not be divested, either by Blake or his assignee, of the right to take possession either of the logs, or the lumber manufactured therefrom, and that the plaintiff by virtue of his appointment as assignee, acquired no greater rights or interests in said logs than Blake himself possessed.*

The proposition is perfectly accurate if applied to the time when the contract of January 25th was in force, and when the defendants were proceeding on their part in good faith to execute and carry out the contract, namely, prior to the 25th of May; but after that date there are no facts to which the law as stated is applicable. I concede the rule of law to be, in cases free from fraud that the assignee stands in no better situation than the bankrupt himself—but the rule does not apply to cases tainted with fraud, and in this case the court finds, that this transaction between *Blake* and the defendants was not only a fraudulent preference under the Bankrupt Act, but that the conveyances were made *with intent to hinder delay and defraud the creditors of Blake.* (Record page 19.)

The fraudulent nature of the transaction, and the corrupt motives of the defendants are conspicuously apparent, in the proposition made by them to *Blake*, that instead of making an assignment as *Blake* proposed, to make a sale to them of all his property, largely exceeding the defendants' debt, and leaving other creditors to whom *Blake* was indebted, exceeding in amount one hundred thousand dol-

lars, without a cent toward the payment of their claims. The conduct of the defendants in this plundering scheme is not such as to entitle them to any great extent to the favorable consideration of the court.

These conveyances were void as being in fraud of the Bankrupt Act. They were also void under the statutes respecting fraudulent conveyances as against the creditors sought to be defrauded, having been made to hinder, delay and defraud the creditors of *Blake*. (2, Comp. Laws 1871, Sec. 4713.)

They are, however, only *voidable* by the act of the creditors sought to be defrauded.

For all other purposes and as to all other persons they are good

In the case of *Odenheimer* v. *Hanson, et. al.*, (4, McLean, 438) the court says: "No court will ever interpose it's authority to settle a matter between *particeps criminis*. They are left as between themselves, where their own fraudulent acts have placed them."

In *Randall* v. *Phillips* (3 Mason, 338,) *Mr. Justice Story* speak- of fraudulent conveyances says: "Such a deed made for such a purpose is not a mere nullity. It is good as between the parties, and binds them and their privies. It may be avoided by any third persons, whose interests are intended to be defeated by it, but it is not absolutely void. The general doctrine is, that a conveyance in fraud of the law binds parties and privies, and cannot be acted upon so far as respects them as a nullity."

In *Hagan* v. *Walker, et. al.*, (14 How, 34,) which was a bill to set aside conveyances made in fraud of creditors, and in which the

grantee was a party to the fraud. *Mr. Justice Curtis* in delivering the opinion of the court, says: "Now these conveyances are not only valid on their face but they are really valid as between the parties; and though they are void as against creditors, and the property both, at law and in equity, is subject to the payments of the debts," etc.

It is therefore insisted with confidence that the conveyances and transfers made on the 25th day of May, 1868, although fraudulent and void as to the creditors of *Blake* are nevertheless valid between the parties, and as a necessary consequence it follows that the mortgage debt was paid, and the mortgage lien extinguished.

The finding does not show the transaction of May 25th, to be that of a creditor, who having a valid security, takes an *additional security* for his debt, or a new security leaving his debt and old securities intact. But it shows it to have been a *sale* for the purpose of *paying the debt*. The case does not therefore come within the range of those authorities which, while setting aside the additional security as a fraudulent preference sustain the validity of the former securities.

The court found and held, the law upon the facts found: "That the rights and interests of the defendants in said logs and the lumber manufactured therefrom, were not affected or impaired by the bill of sale of May 25th, 1868; that the defendants neither gained or lost any rights because of the said bill of sale of that date."

This finding of the law in this case seems to be based upon the

hypothesis, that as the bill of sale was made in fraud of the provisions of the Bankrupt Act, and also to hinder delay and defraud creditors, it was therefore void, not only as to creditors defrauded, but as between the parties and could have no effect given to it whatever; or, if once effective between the parties when avoided by the assignee of *Blake* in bankruptcy, in behalf of the creditors of the estate, it was avoided also as between *Blake* and defendants and restored them to their former rights under the contract of January 25th, 1868.

I submit that this statement of the law by the learned judge as applicable to this case is erroneous.

I have already called the attention of the court to the finding of facts which show that these defendants were *particeps criminis*, in the fraudulent design; that they in fact concocted the scheme whereby the creditors of *Blake* were to be hindered, delayed, and defrauded. In such cases when the fraudulent contract is avoided the fraudulent grantee is not put into a position as if the transaction had never occurred.

He loses whatever he has paid, even if it be the full value of the property.

The doctrine is fully and clearly laid down and recognized in the case of *Bean* v. *Smith*, and others. (2 Mason, page 296.) This was a bill in behalf of a creditor to set aside fraudulent conveyances—The debtor was indebted to his grantee, at the time the conveyances were made and the grantee had also made advances on the strength of the conveyances after they were executed. *Mr. Justice Story* in

delivering the opinion of the court says: "The next question that arises is, whether the conveyances are to stand as securities, for the sums which have been really advanced or paid by them for their father since the execution of these instruments. I agree with the doctrine laid down by *Mr. Chancellor, Kent,* in *Boyd* v. *Dunlap,* 1 Johns Ch. R. 478 and *Sands* v. *Codwise,* 4 Johnson R. 536,549 that a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity, but is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent. At law, where a conveyance is found to be fraudulent against a creditor, he comes in and avoids all without the repayment of any consideration." And again upon page 298. "In the present case it appears to me that the court is bound by the strict rule. The conveyances were in their very concoction fraudulent. They were therefore in the language of the statute utterly void as against creditors and cannot be permitted to stand as for any advance subsequently made, or any pretended debts then due. All the reasons of public policy, so forcibly urged in *Sands* v. *Codwise* (4 John, R. 598.) against such an allowance, command the court to be rigid in denying to those who are guilty of bad faith any such indulgence. Let them reap the due reward of their own misconduct." And the court decreed "that the said conveyances before mentioned, having originated in a meditated fraud upon the creditors of said *Simeon Smith,* cannot be permitted to stand as a security for any debts then due to the grantees, or for any subsequent advances by them made in furtherance of the original intention of the parties thereto."

The true principle underlying the authorities is, that where parties with intent to commit a fraud have parted with valuable rights or relinquished valuable claims, courts in extending relief to those defrauded will not render to the fraudulent grantees any assistance in recovering the rights they have parted with, or assist them in re-establishing claims relinquished. But will leave them where their voluntary acts have placed them. It will not when called upon to extend its protection to those defrauded, restore the guilty parties to their former position, or to their former rights. To do so would be to place a premium on dishonesty. For if it is true, that they neither lose or gain anything when the fraudulent conveyance is declared void by the court, then indeed, did *Hackley & Sons* have a splendid chance of gaining over a hundred thousand dollars in case they should not be interfered with by the creditors of *Blake*, and they ran no risk whatever if their transactions were set aside as fraudulent; since they would "be remitted and *restored to their previously existing rights*."

I deny that the avoiding of the contract by the creditors has any such restorative power. If it be true that it does, then it is not true that the contract is valid between the parties.

The counsel for the defendants states his proposition as follows:

"When the creditors avoid the conveyance, the law remits and restores the mortgagee to his previously existing rights. This gives the statute its proper and legitimate effect; permits the purchaser to hold nothing by his fraudulent contract, and the creditors to take all their debtor fraudulently conveyed and nothing more," and he cites as supporting this proposition several authorities.

The elder in point of time is the case of ***Hoyt*** v. ***Dimon***, 5 Day, 479. An examination of the case shows it to have been an action by an execution creditor, to enforce a levy against lands as belonging to his judgment debtor. The defendant claimed title by force of a mortgage deed from ***Austin Nichols***, (the debtor), to ***Philo Norton*** given in 1797 and by virtue of an absolute deed from ***Nichols*** to ***Norton*** in 1798. The plaintiff claimed that both the mortgage and the deed were void as to him by the provisions of the statute against fraudulent conveyances. The court charged the jury that the only material fact for them to find, was whether the mortgage deed from ***Austin Nichols*** to ***Norton*** was fraudulent; if so, they must find their verdict for the plaintiff; if otherwise, they must find for the defendant. The jury found for the defendant. ***Baldwin, J.*** delivering the opinion of the court says; "The mortgage then is valid, unless defeated by the absolute deed from ***Austin Nichols*** to ***Philo Norton*** the mortgagee. This, it is claimed, absorbed the mortgage though void as to creditors, it being good between the parties. The question, on this branch of the case can arise only on the ground that the absolute deed is fraudulent; for, the moment we admit its application to the mortgage, as payment, either by express contract or legal inference, we admit a legal consideration, which may give validity to the deed."

Right here may it please the court, lies the fallacy of the whole reasoning of the learned judge on this branch of the case. For a conveyance may be void as to creditors although there was a legal consideration between the parties. The question of a valuable or legal consideration is not the test of the validity of a fraudulent conveyance, but the intent to hinder, delay, and defraud the creditor

in the collection of his debt. And the court evidently begs the question when he adds, "For, if given and received *bona fide*, for a good and valuable consideration, as it would be, if given in discharge of a pre-existing mortgage of equal value, the title under it would be unquestionably good." Of course "if given and received *bona fide*, for a good and valuable consideration" it would be unquestionably good, and would not be obnoxious to the statutes respecting fraudulent conveyances. The court proceeds to state that admitting the deed to have been made with the fraudulent intent to defeat creditors, it is as to them utterly void, and of no effect. "Their claim on the property still remains as though the deed did not exist; of course, it can have no effect by legal inference to absorb the mortgage debt. They must take the estate (as it was before such void deed was given,) subject to the mortgage."

No authority whatever is cited by the court in support of this proposition. It cannot stand with the decison of this court in the case of *Hagan* v. *Walker*. (14 How., 34.) It cannot stand under the policy of the Bankrupt Act.

The leading feature—the cardinal policy of the Bankrupt Act is an equal distribution of the assets of the insolvent debtor among all his creditors. This policy is guarded by the most stringent provisions and enforced by the most severe penalties. Thus, if a transfer be made by an insolvent person with a view of giving a preference to a creditor, the transfer is void and the assignee may recover the property transferred, and if the creditor receiving the transfer had reasonable cause to believe that a fraud on the act was intended, he cannot prove his debt in bankruptcy. (Sec. 35, 39.)

Thus, by an attempted fraud of this kind on the Act, the creditor not only loses what he received, but the debt sought to be prefered is extinguished. Hence the reasoning of the court in *Hoyt* v. *Dimon* entirely fails when applied to fraudulent preferences under the Bankrupt Act. For the Act does subject the fraudulently preferred creditor to penalties in the loss of his debt. It does enlarge the fund of the creditor as well as protect it. It does not remit and restore the parties to their previously existing rights. It does not permit the fraudulent transferee to hold anything by his fraudulent contract; and it does permit the creditors to take all their debtor fraudulently conveyed, and enlarges the fund by preventing the creditor from proving his debt, which might have been a valid claim against the assets of the debtor, but for the attempted fraud.

Suppose under the statutes against fraudulent conveyances, the property conveyed to the fraudulent grantee should exceed ten thousand dollars in value, and that the debts of the fraudulent gaantor were only one thousand dollars, and the conveyance was avoided by the creditors, and property sufficient to satisfy the demands of the creditors was recovered; could the fraudulent grantor reclaim the balance of the property conveyed? And yet if the parties were restored to their previously existing rights, he could do so.

The next case on defendants brief in point of time, is that of *Irish* v. *Cloyes & Morse*, 10 Ver. 81, and it is based upon the decision of *Hoyt* v. *Dimon*. The other cases cited by the court, belong to that class where *one of the parties* to the contract is defrauded,

and has a right to be relieved from the fraudulent contract in a court, and he says that "the general rule of law is the same in all such cases, that is, where the contract is avoided the parties are restored to their previously existing rights;" and therefore, says the court "by perfect parity of reasoning, by analogy of principle, by every rule of consistency and symmetry, it must be held that, when the creditors avoid the deed, *the law remits and restores the other party to his previously existing legal rights.*"

Now if *the law* restores and remits the other party, that is the fraudulent grantee, to his previously existing rights, it must also have the effect to restore and remit the fraudulent grantor to his, so that a better and more correct statement of the principle contended for, would be to say, that when the creditors avoid a fraudulent transfer, *the law* remits and restores the parties to *the fraudulent transfer* to their previously existing legal rights."

I can see no principle of "analogy," to say nothing about "symmetry," between the two classes of cases. The plain distinction is, that in the one class the law, through the courts, from motives of public policy, will afford relief to the party to the fraudulent contract, but it requires him, since he asks equity, to do equity, and thus restores the parties to their previously existing rights; and in the other class of cases, neither the law or the courts, from motives of public policy, will afford relief to the parties to the fraudulent contract, but will leave them where they have placed themselves, "to reap the reward of their own misconduct," preferring to regard the contract as valid between the parties.

And this position is fully supported by the case of *Britt* v.

Aylett, 6 Eng. (Ark.) 475, cited in defendants brief; *Ladd v. Wiggin*, 35 N. H. 421, is based upon *Irish* v. *Morse* and *Hoyt* v. *Dimon*, it follows the reasoning of those cases and cites them as authorities. It is based upon this proposition. "The general rule of law, as between parties is, that when a contract is avoided for any cause, each is restored to his previously existing rights. They are placed back in their original position." This proposition is true only in a certain class of cases, in which conveyances made for the purpose of defrauding creditors are not included.

I will, however, direct the attention of the court to the difference between the facts of that case, and the one at bar. In that case, the absolute deed was given as a security, and not in payment of the debt—hence the court held that the debt was not paid, or the security extinguished. In this case, the transfers and conveyances were not made as a *security* for the debts owing to *Hackley & Sons*, but the indebtedness constituted the consideration for the transfers, and was consequently paid. Again, in *Ladd* v. *Wiggins*, the court says: "It is true that where the estate of the mortgager and mortgagee becomes united in the same person, *prima facie*, the mortgaged debt is extinguished," but the jury found in that case that the mortgaged debt still existed. In the case at bar, it is not found as a fact, that the indebtedness of *Blake* to *Hackley & Sons* continued to exist after the 25th of May 1868; on the contrary, the court finds, folio 46, "That thereupon said defendants and said *Blake* estimated the quantity of logs not then manufactured at fourteen million feet; *placed an estimate upon the value* of the logs covered by said contract; *figured up the advances that had* been

made thereon," and then sold and conveyed to ~~*Blake*~~ defendants all, or nearly all his property including said logs, "and in folio 50, that the consideration for said conveyances and transfers was the indebtedness at that time owing from *Blake* to the defendants," and in folio 51 "That after the execution and delivery of the said bill of sale as aforesaid, the defendants *ceased* to sell the lumber manufactured from the logs furnished under said contract on the joint account of themselves and the said *Blake*, but sold the same on their own account alone." Facts showing not only that the mortgage debt was extinguished, but the contract of January 25th, also.

This being so, and being avoided by the assignee in bankruptcy, the law does not remit the defendants to their previously existing rights. In *Paine* v. *Waite*, 11 Gray, 190, the plaintiff had had as security for a debt due him from the insolvent, two mortgages which were valid, he then having reasonable cause to believe his debtor insolvent, delivered up the old note and mortgage, and took a new note and mortgage, which covered some of the property, included in the old mortgages and other goods.

Neither of the old mortgages was discharged or satisfied except as above stated.

The court held it to be a case where an old security was abandoned and given up, and a new one taken as a substitute for that which previously existed, and held that the plaintiff could not claim under his two first mortgages because, they were by agreement of parties given up and a new note and mortgage taken in their stead, and could not stand on his last mortgage, because it was invalid as against creditors.

And yet if the doctrine contended for by the defendants in this case is correct. When the last mortgage was declared invalid as against creditors, the party was remitted and restored to his previously existing legal rights, and he could have stood on his first mortgages which were admitted to be valid.

Indeed this construction is necessary in order to carry out the clear intent of the Bankrupt Act.

It does not undertake to place things as they would have been except for the void act.

Thus, if one had purchased property of a bankrupt to aid him in perpetrating a fraud, and paid a consideration therefor, while the assignee could recover the property of the vendee, the latter could not recover the consideration paid, even if it passed into the general assets of the bankrupt and was in the assignees hands; or,

Suppose a creditor to whom a bankrupt owes ten thousand dollars, holds security on the property of the debtor for five thousand dollars, and the debtor intending to prefer him, pays his debt in cash, he knowing or having reasonable cause to believe a fraud upon the provisions of the Bankrupt Act was intended. The assignee could recover back the full amount of the money paid, and the creditor could *not prove his debt in bankruptcy* (Sec. 39); but could he turn around and enforce his security against the property of the debtor? Manifestly not, because all creditors whether secured or unsecured must enforce their claims in and through the bankrupt court, they become at once, by virtue of the bankruptcy, parties to the proceedings, and they and their debts are thereby brought

under, and subject to the sole and exclusive jurisdiction and control of the bankruptcy court.

There is no difference whatever between a secured and unsecured creditor as regards the mode, or the proceedings necessary under the Bankrupt Act, by which they may be placed in a position to enforce their respective rights; that is to say, a secured creditor has no greater or better right to proceed against, or receive payment from, the *particular* fund or asset upon which he has a lien, without the necessary preliminary step *of proving his debt* in the bankruptcy, than an unsecured creditor has to proceed against and receive payment from the *general assets* without such proof.

The proof of debt being a necessary preliminary step to enforcing the lien, it follows in cases where by section 39 of the Bankrupt Act the *debt is not provable*, the lien cannot be enforced; it falls with the debt. (*Phelps* v. *Selick* 8, Nat. Bank Reg. 390, and cases cited in opinion of the court.)

Suppose in this case Foster, the assignee had taken possession of the logs in question, upon which the defendants claim a lien; and had sold them and brought the proceeds into court, and the defendants had applied to the court for the fund to pay the debt secured by the lien; and the court had found the fact to be, that defendants had received a preference to the extent of their debt, under such circumtances as precluded them from proving their debt in bankruptcy: would this court say that they were still entitled to payment to the extent of the avails of the property upon which they held a lien; although they were precluded from proving their debt. (Bankrupt Act, Sec. 23.) In this case the court finds that the value of the

personal property transferred, aside from the logs in question, was over sixteen thousand dollars; it is embraced in the same bill of sale that transferred the logs; and this property and the lands conveyed at the same time were all transferred and conveyed with a view to prefer this debt of *Hackley & Sons*, and they had reasonable cause to believe that a fraud on the provisions of the bankrupt act was intended at the time they received such conveyances. For the value of the other property embraced in the bill of sale, he has already obtained a judgment in an action of trover. The logs in question had not yet arrived at the point where they were to be delivered, there had been no breach of the conditions of the mortgage; the absolute title passed to the assignee in bankruptcy; they were transferred by *Blake* as a fraudulent preference and under the provisions of the bankrupt act the assignee is entitled to recover their value in this action. That value the court did not find, but it found the value of the lumber into which the logs had been converted, to be one hundred and twenty-six thousand four hundred and eight dollars and sixteen cents.

This fact the court has found in fo. 50, page 18. I insist by that judgment these facts are *res judicata*; viz:

1. *Blake's* insolvency.

2. His transfer by this bill of sale to *Hackley & Sons* of all the property embraced in it with a view to give them a preference.

3. When they received said transfer they had resonable cause to believe that *Blake* was insolvent, and that said bill of sale was made in fraud of the provisions of the bankrupt act.

This judgment establishes the *character* of the transaction and the *status* of the parties to it. The law punishes *Blake* in this regard by disentitling him to a discharge, (Sec. 29,) and *Hackley & Sons* by prohibiting them from proving their debt in bankruptcy. If there could be any doubt whatever as to the effect of the facts found on page 19 of the record, upon the rights of *Hackley & Sons* to prove their debt in bankruptcy, the judgment in favor of the assignee againt these defendants for the value of a portion of the property transferred by this same bill of sale, for the same preference entirely solves the doubt and settles the question.

Will it be contended that although *Hackley & Sons* are precluded from proving their debt in the bankruptcy court, still they can enforce the payment of it by a foreclosure of their mortgage? Such, it seems to me, would be a clear evasion of the law. The debt was sixty three thousand dollars. The preference was for the whole debt. No part of it could be proved. And to allow a creditor to enforce a security by taking a specified part of the assets of the bankrupt, in defiance of the bankrupt court, would be to permit a person who had forfeited all claims to a share in the assets, to exercise a greater right than the holders of valid claims, which are secured by valid liens, to exercise. The decisions are numerous and unbroken, that a secured creditor cannot proceed to enforce his security without leave of the bankrupt court. And the reasons are obvious—the security may not be valid, or the *debt secured may not be provable against the estate.* A person who represents himself to be a creditor holding security, and who neglects to come forward and prove his debt, ~~he~~ can be brought before the bankrupt court, on petition

of the assignee, to have the validity and extent of his claim against the estate determined, and when the object is simply to determine its extent, doubtless this is the proper proceeding. But in this case *Cui bono?* Since it appears, both by the judgment of the court and the finding of the court, that the claim could not be proved. The title to the logs vested in the assignee as soon as the assignment was executed. "And with this title he acquired the right of immediate possession," (*Johnson* v. *Bishop*, 1 Wool., C. C. 325) and he could properly bring his action without first going through the useless formula of obtaining a decree of the District Court, declaring the claim of the defendants not provable under the Act.

If the principle contended for by defendants' counsel is correct, then we have this state of things: the bakruptcy court is not exclusive in the administration of the assets of the bankrupt, and a party who is confessedly precluded from proving his debt and sharing in the assets, may yet seize upon a large share of those assets and convert them to his own use, to satisfy a claim which the bankrupt law excludes from its protection or benefit.

The finding of the Court in this case shows that the contract of January 25th was terminated by the transfers and conveyances of May 25th 1868, by which the debt of the defendants was preferred, it becomes unnecessary, therefore, to inquire what the rights of *Hackley & Sons* would have been under the contract of January 25th, if it had not been affected by any subsequent agreement between the parties, or by any fraudulent preference.

I submit to the Court that in every point of view, whether the conveyances from *Blake* to *Hackley & Sons* are void as against the statutes of *Elizabeth*, or void as against the policy and provisions of the Bankrupt Act, the judgment below is erroneous, and ought to be reversed.

J. W. CHAMPLIN,
Att'y for Pl'ff in Error,
And of Counsel.

IN THE

SUPREME COURT

OF THE UNITED STATES.

WILDER D. FOSTER, ASSIGNEE OF ALEXANDER BLAKE, IN BANKRUPTCY,
Plaintiff in Error.

—vs.—

JOSEPH H. HACKLEY, ET AL.,
Defendants in Error.

Error to the Circuit Court of the United States, for the Western District of Michigan.

Points and Argument for Defendants in Error.

EGGLESTON & KLEINHAUS, Att'ys for Defendants.

E. A. STORRS, of Counsel.

Inter-Ocean (Beach & Barnard) Printing House, 119 Lake Street, Chicago.

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Points for Defendants:

1st. That the various contracts, made and entered into between the defendants and Blake, were merged in the contract bearing date January 25, 1868.

2d. That, by the contract of January 25, 1868, the defendants became mortgagees in possession, with a right to the continuance of possession until the repayment to them of their advances to Blake.

3d. The findings of the Court show that the advances by defendants to Blake have not yet been repaid, and that there was, at the date of the findings, due to the defendants on that account the sum of $14,717.30, besides interest.

4th. The contract of January 25, 1868, having been made for a present consideration, and more than four months before the commencement of bankruptcy proceedings, is binding between the parties, and cannot be avoided either by Blake or his assignee.

5th. By virtue of that contract, the possession by the defendants of the property in controversy was lawful, and there has been no conversion by them,—hence the action of trover cannot be maintained.

6th. The only action that the plaintiffs could maintain would be assumpsit, for money had and received, in case the defendants realized from the lumber a sum in excess of the indebtedness of Blake to them, on account of their advances under the contract.

7th. If the various contracts, between Blake and the defendants, did not merge in the contract of January 25, 1868, still the plaintiffs could not maintain this action, because possession of the logs was vested in the defendants by all the preceding contracts.

8th. The contract of January 25th, 1868, did not merge in the bill of sale of May 25, 1868, which was void under the Bankrupt law.

The rule on this subject is, that a fraudulent release of an equity of redemption does not destroy or extinguish the mortgage.

When the creditors avoid the conveyance, the law remits and restores the mortgagee to his previously-existing rights. This gives the statute its proper and legitimate effect; permits the purchaser to hold nothing by his fraudulent contract, and the creditors to take all their debtor fraudulently conveyed, and nothing more.

Ladd v. *Wiggin*, 35 N. H., 421.
Hoyt v. *Dimon*, 5 Days' R. (Conn.,) 479.
Irish v. *Cloyes*, 10 Vt., 81.
In re. Kahley, 4 Bank Reg., 124.
Towl v. *Hoitt*, 14 N. H., 61.
Stedman v. *Vickery*, 42 Maine, 132.
Britt v. *Aylett*, 6 Eng. (Ark.,) 475.
Mead v. *Combs*, 4 C. E. Green, (N. J.,) 112.
Ripley v. *Severence et al.*, 6 Pick., 474.
Sawyer v. *Turpin*, 5 Bank Reg., 339.
Porter v. *Eastman*, 14 Wis., 39.
Meshke v. *VanDoran*, 16 Wis., 319.
Stokoe v. *Cowan*, 29 Beav., 637.
Clayborn v. *Hill*, 1st Wash., (Va.,) 177.

EGGLESTON & KLEINHAUS,
For Defendants.

Argument.

Plaintiff in error brought suit in the United States Circuit Court for the Northern District of Michigan, as assignee in bankruptcy of Alexander Blake, against these defendants, claiming to recover against them in trover the value of a large quantity of saw-logs, alleged to have been fraudulently transferred by the said Alexander Blake to the defendants in error.

The cause came on to trial before the court, without a jury, as per stipulation of the parties, (see record, page 12,) and resulted in finding for the defendants in error. (See record, pages 13 to 20, both inclusive.) From this judgment, the plaintiff in error comes to this court. The court found, as facts, substantially and briefly as follows:

That on the 25th day of January, 1868, and for several years prior thereto, the defendants were partners, owners of a saw-mill, and engaged in the manufacture of lumber at Muskegon, under the firm, name and style of Hackley & Sons. That during all the said time, Alexander Blake was engaged in the lumbering business in Western Michigan, furnishing logs to be manufactured into lumber,

and, in connection with said business, engaged in merchandising in Newago, in said western district. That on the first day of August, 1867, the defendants and said Alexander Blake entered into a contract with each other for the furnishing of saw-logs, by said Blake to said Hackley, of six million feet, to be sawed by the defendants, at their mill in Muskegon, on shares. That said contract was on the fourth day of September reduced to writing, and is fully set forth on pages 13 and 14. By said contract, it was stipulated that Blake was to deliver the logs at the booms of the Muskegon Booming Company, at Muskegon, free of all expense to the defendants. That the defendants were to pay the cost of rafting up and delivering the logs at their mill; were to take the logs to the amount of six million feet, board measure, and saw the same on shares for one-half of the lumber they produced; all the lumber manufactured from said logs to be sent forward to market and sold to the best advantage, the net proceeds of said sales to be equally divided between the parties to this agreement. The defendants to advance Blake the sum of three dollars per thousand feet, board measure, to enable him to put in the said logs, which advance was to be paid, from time to time, in cash, in proportion as the work progressed, it being understood that all money so advanced was to be applied solely to the prosecution of the job, and to no other purpose.

This contract also contained a provision as follows: "The right of possession of all the within mentioned logs "and lumber is hereby vested in the said Hackley & Sons, "as fast as the said logs are cut and banked." That in the latter part of September, 1867, this contract was enlarged to ten million feet; that in October, 1867, it was again changed to fifteen million feet, and subsequently, on the 25th day of November, 1867, to eighteen million feet, which last contract was, on the twenty-fifth day of January, 1868, reduced to writing, signed by the parties, and contained the same provisions as the one heretofore referred to, with the addition that in the contract of the 25th of January, 1868, it was provided that Hackley & Sons should advance four dollars per thousand feet. That Blake was to pay interest on all advances at the rate of ten per cent. per annum until paid; said advances, with the interest thereon, to be paid said Hackley & Sons from the proceeds of the first lumber sold. Said Blake, for the purpose of securing payment of said advances, and the interest thereon, granted, bargained and sold unto the said Hackley & Sons, all the property described in said contract, there being part of them in Muskegon river, and on the bank of said river, and in the woods where they were cut, and where the same were then being cut and marked, as aforesaid. The said contract also provided that said Hackley & Sons should be deemed to be in pos-

session of said pine saw-logs, and the right of possession was thereby vested in them until the said sum of money should become due and payable, as aforesaid. (Printed record, pages 15 and 16.)

That the court also found, as a matter of fact, that under these contracts, and in the execution and performance thereof on their part, the defendants advanced to Blake, between the first day of August, 1867, and the twenty-fifth day of January, 1868, the sum of $41,066.86. That at the time said contract was made there was a balance due from Blake to the defendants and the firm of Hackley & McGordon, $21,669.63, on account of advances made to said Blake, on logging contract for the preceeding year, and which, on the settlement of the account between the defendants and said Blake, on the first day of January, 1868, was incorporated in the account of said Blake with said defendants, for that season, and charged up against him; and that between the said twenty-fifth day of January, 1868, and the twenty-fifth day of May, 1868, the said defendants advanced to said Blake, under said contracts, the further sum of $15,184.89.

That under said contract Blake banked and put into the Muskegon river, before the twenty-fifth day of May, 1868, 13,779,244 feet of logs, which were received and manufactured into lumber by the said defendants, during

the year 1868; and that up to the said twenty-fifth day of May, there had been manufactured from said logs, by the said defendants, and shipped by them to the city of Chicago, and there sold, four miliion feet of lumber. That the entire amount of said logs was, by the defendants, manufactured into lumber and sold by them, or their agents, in the city of Chicago; the proceeds thereof applied to their own use, and that the total amount realized by them from the sale of said lumber was $126,408.16 That on the twenty-fifth day of May, 1868, Blake, being unable to pay his debts, and in an insolvent condition, made an assignment, to the defendants, of all said logs and a large quantity of other property. That at the time of the execution and delivery of said bill of sale no agreement was made or entered into for the surrender of said contract of January 25th, 1868, nor was the same surrendered or delivered up by the defendants to the said Blake, but the defendants retained and held the same. (Printed record page 18, Finding sixth.)

That on the second day of June, 1868, a petition was filed in the United States District Court for the Western District of Michigan, by creditors of Blake, praying that he be declared a bankrupt. That on the tenth day of June, 1868, he was declared a bankrupt, and on the twenty-fifth of June, 1868, plaintiff in error was duly appointed

assignee of the estate of said Blake, and duly qualified as such. That as such assignee, the said plaintiff, before the commencement of suit, demanded from said defendants the logs described in said contract, with lumber manufactured therefrom. The defendants refused to deliver the same.

As conclusions of law, from these facts thus found, the court below found that the various contracts hereinbefore recited, entered into between Blake and the defendants, were merged in the contract bearing date January 25th, 1868. That the defendant acquired an interest in and a lien upon the logs furnished them by Blake, to the extent of the amount of the advances made by them during that season; that said defendants' lien was not limited in its extent to the amount of advances made subsequent to the said twenty-fifth day of January, 1868, but embraced the whole amount advanced by them to Blake to enable him to put in the logs which were furnished them that season.

The court further found that the rights and interest of the defendants in said logs, and the lumber manufactured therefrom, were not affected or impaired by the bill of sale of May 25th, 1868. That they had the right to the possession of those logs and lumber, as against Blake, and that his assignee in bankruptcy could acquire, by his appointment as such assignee, no higher rights than Blake himself possessed.

The case itself is a serious one, if we regard the amount involved; but if reference is to be had simply to the character of the question submitted by this record, it is submitted on behalf of the defendant in error, that there is not sufficient seriousness to be attached to them to warrant any very extended discussion. Clearly, the bankrupt law was never intended to deprive men of the right of buying and selling property; nor of the right of making contracts; nor of the right of securing themselves for advances which they make. It is deemed by us that, perhaps the best argument which we can address to this court, is a mere recital of the facts which we have given, which present this simple question: the advances of tens of thousands of dollars by these defendants to the bankrupt when his credit was unimpaired and his solvency unquestioned, for the purpose of enabling him to carry out a logging contract, and putting into the Muskegon river a large quantity of logs, which were to be manufactured into lumber by the defendants and at their mills; and one-half of which, by the terms of these contracts, were to belong to the defendants for the labor which they expended upon such manufacture.

It is deemed by us idle to cite authorities to establish the proposition, that every dollar of advance carried with

it, the instant the advance was made, a dollar's worth of lien, and that every log, so quick as it was severed from the stump and banked, ceased then, to all intents and purposes, to be the property of Alexander Blake, and became, by the express terms of the stipulation, into which they entered, the property of these defendants, These persons were competent to contract with each other. There is not only nothing unusual in the terms of the contract, but even a very slight familiarity with the manner in which that business was conducted, shows that contracts of that character are not only usual but also indispensable. From the very moment that the contract was made, the first one for the cutting of the six million feet of logs, up to the final moment of the execution of the bill of sale, the advances made by the defendants began, and were continued by them down to the last moment, when, through the declension of prices, disaster finally overtook Blake.

In each one of these contracts, it would be observed, that the parties have solemnly agreed with each other, that the logs shall be deemed to be, and shall be, in law, and in fact, the instant they are cut, in the possession, and subject to the exclusive control and dominion of the defendants. The contract of the 25th of January, in addition to that, contains a mortgage stipulation which shows how

important the parties deemed it to be, that the lien, which the very nature of the business created in behalf of the defendants, should be maintained and preserved.

We reach then, if the court please, this stage in the argument. Advances to the extent of between sixty and seventy thousand dollars, made under a contract by which the defendants had bound themselves to make the advances under an agreement that every dollar of advance was to be taken as a lien upon the property, for the creation of which the advance was made; the full and complete performance of the contract on their part. How, then, has the lien, which the parties thus solmenly created, been divested? How have the rights, which the very nature of the transaction gave them, been surrendered? Certainly it is not pretended that the very ownership which Hackley and Sons had in those logs, by reason of their agreement with Blake, has been surrendered by them to Blake, or to his assignee, by any affirmative paper upon their part. No such paper is in evidence; no such pretense is made, but it is claimed that having an absolutely valid contract, just as valid without being in writing, as it is while in writing, three times repeated, and large advances made upon it, the defendants have lost all the benefits of three unquestionably valid contracts, because for the supposed enlargement of the rights which those

contracts gave them, they made one contract which was invalid.

I suppose it will be considered as true, that had Hackley and Sons, made a deed of their farm to Alexander Blake, which had been regularly recorded, founded upon sufficient consideration and proper in all its respects, that the title of Alexander Blake, to the property thus described, would not have been divested, because, subsequently, when it was quite unnecessary, Hackley and Sons made him another deed that was irregular in point of form; invalid in the manner of its execution. The doctrine of merger has never been carried to this extent. It has been always maintained to be clearly a question of intent, and the extent to which the court in its finding of facts has gone in this case, clearly shows that neither of these parties, neither the defendants nor Blake himself, ever contemplated a surrender of any of the rights which they had under those contracts, nor any of the rights which the actual fact of the advances gave them, as a lien npon the property.

The court finds, as a matter of fact, that there was no agreement to cancel. As a matter of fact, that there was no cancellation. There being neither agreement for cancellation, nor cancellation in fact, it can hardly be maintained that it was the intention of the parties to surren-

der the benefits of contracts thus large in amoung, and place them upon the conjectural chances resulting from the bill of sale, entered into with a confessedly acknowledged bankrupt. There was no surrender of the contract itself. They were all retained in the possession of the defendants in error. The lumber was retained by them; the logs were manufactured into lumber; the lumber, as the court finds, sold after the execution of this bill of sale on their own account; and it further turns out to be a fact, that there is still due to them, the sum of fifteen to twenty thousand dollars, after deducting from the gross proceeds of the sales of lumber, the one-half thereof, to which the defendants were entitled by virtue of the contract, as money which they advanced pursuant to its provisions. But however that question may be, one thing must be considered as certain. The pending of the court below, as to the matter of fact, is conclusive. This court will not undertake to review it. The court has found that these contracts were not cancelled, that they were not surrendered; that there was no agreement for cancellation or surrender. This places the question of merger, beyond the realms of discussion; leaves it as a concluded and demonstrated question, and substantially settles the entire case.

As to the authorities upon the question of merger, I

respectfully refer the court to the points filed by my associates, Messrs. Eggleston and Kleinhaus, in connection with this argument.

The contracts show for themselves, that the defendants in error had the possession, and the right of possession to this property; they had the right to proceed with the performance of the contract; to manufacture logs into lumber, to sell the lumber, and to appropriate the proceeds of that lumber to the payment of the one-half belonging to them, and to the advances which they had made. That is substantially a demonstrated fact upon the findings, and whatever other rights the assignee, or his representative in bankruptcy, might have had to any excess, no question as to those rights can be presented in this case, for the form of the action is *trover*, and the right of possession having been demonstrated to be in us, this form of action falls to pieces.

It is hardly necessary to pursue the discussion of this branch of the question further, because it appears from the findings, so far from the defendants in error owing Blake, there is still a deficit of about fourteen thousand dollars due them; but if they did owe Blake, in no form of action except that for money had and received, could any recovery be had, by his representative in bankruptcy,

or otherwise. This case has been a wearisome one, and pending for years. In no single instance have the plaintiffs in error succeeded in establishing the extraordinary claim which they make to the property. And we are simply rejoiced that we have finally reached a tribunal where discussion will terminate; where rights will be inevitably and finally settled; where these defendants can be relieved from this oppressive and wearisome litigation.

Respectfully submitted,

EMERY A. STORRS.

SUPREME COURT

OF THE UNITED STATES.

NOYES L. AVERY, Assignee of ALEXANDER BLAKE,
a Bankrupt, Plaintiff in Error,

vs.

CHARLES H. HACKLEY, et al., Defendants in Error.

Points and Argument

FOR DEFENDANTS IN ERROR.

EMERY A. STORRS,

and

EGGLESTON & KLEINHANS,

Attys. for Def'ts. in Error.

Beach, Barnard & Co., Legal and Commercial Printers, 98 Randolph Street, Chicago, Illinois.

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Points for Defendants.

1st. That the various contracts, made and entered into between the defendants and Blake, were merged in the contract, bearing date, January 25, 1868.

2d. That, by the contract of January 25, 1868, the defendants became mortgagees in possession, with a right to the continuance of possession, until the repayment to them, of their advances to Blake.

3d. The findings of the court show that the advances by defendants to Blake, have not yet been repaid, and that there was at the date of the findings, due to the defendants on that account, the sum of $14,717.30, besides interest.

4th. The contract of January 25, 1868, having been made for a present consideration, and more than four months before the commencement of bankruptcy proceedings, is binding between the parties, and cannot be avoided either by Blake or his assignee.

5th. By virtue of that contract, the possession by the defendants, of the property in controversy, was lawful, and there has been no conversion by them,— hence the action of trover cannot be maintained.

6th. The only action that the plaintiffs could maintain, would be assumpsit, for money had and received, in case the defendants realized from the lumber a sum in excess of the indebtedness of Blake to them, on account of their advances under the contract.

7th. If the various contracts, between Blake and the defendants, did not merge in the contract of January 25, 1868, still, the plaintiffs could not maintain this action, because possession of the logs was vested in the defendants by all the preceding contracts.

8th. The contract of January 25th, 1868, did not merge in the bill of sale of May 25, 1868, which was void under the bankrupt law.

The rule on this subject is, that a fraudulent release of an equity of redemption, does not destroy or extinguish the mortgage.

When the creditors avoid the conveyance, the law remits and restores the mortgagee to his previously-existing rights. This gives the statute its proper and legitimate effect; permits the purchaser to hold nothing by his fraudulent contract, and the creditors to take all their debtor fraudulently conveyed, and nothing more.

Ladd v. *Wiggin*, 35 N. H., 421.
Hoyt v. *Dimon*, 5 Days' R. (Conn.,) 479.
Irish v. *Cloyes*, 10 Vt., 81.
In re Kahley, 4 Bank Reg., 124.
Towl v. *Hoitt*, 14 N. H., 61.
Stedman v. *Vickery*, 42 Maine, 132.
Britt v. *Aylett*, 6 Eng. (Ark.,) 475.
Mead v. *Combs*, 4 C. E. Green, (N. J.,) 112.
Ripley v. *Severence et al.*, 6 Pick., 474.
Sawyer v. Turpin, 5 Bank Reg., 339.
Porter v. *Eastman*, 14 Wis., 39.
Meshke v. *VanDoran*, 16 Wis., 319.
Stokoe v. *Cowan*, 29 Beav., 637.
Clayborn v. *Hill*, 1st Wash., (Va.,) 177.
White v. *Gainer*, 2 Bing., 23.

EGGLESTON & KLEINHANS,
For Defendants.

Argument.

MAY IT PLEASE THE COURT:

Since this case was submitted at the last term of this court, we have been furnished with a copy of the appellant's argument, to which we desire, as briefly as may be, to reply. It seems to us that the entire discussion is narrowed down to the single point, whether the contract of January 25, 1868, was merged in the bill of sale of the following May.

No question has been made as to the validity of that contract, nor as to the amount of the advances made by the defendants, under it, nor is it disputed that those advances were made in entire good faith.

We direct attention, therefore, to the single question: "Was "the contract of January 25, 1868, abandoned by the parties "thereto, and merged in the bill of sale?"

The plaintiff thus states his position: "The defendants can- "not set up the contract of January 25th, to defeat plaintiff's "right to recover, because that contract has been merged in, "and extinguished by the new contract of May 25th, and they "cannot stand on the new contract of May 25th, because it is "void as to creditors." In support of this position, the plaintiff cites:

Paine v. *Waite*, 11 Gray, 190.
Cox v. *Wilder*, 5 Nat. Bank Reg., 443.
Carr v. *Hilton*, 1 Curtis C. C., 233.

These cases, it will be found upon examination, fall very far short of sustaining the proposition in support of which they are cited.

In *Paine* v. *Waite*, the plaintiff had sold to one Whitney, a quantity of merchandise, taking his note therefor, secured by mortgage on the goods. An agreement was, it was claimed, also

made, that new mortgages should, from time to time, be made on new purchases, to keep the plaintiff secure. Payments were made from time to time, to the amount of about half the note, and a new mortgage was then executed, to secure the amount still due.

Several months thereafter, Whitney told the plaintiff that he had a number of notes becoming due the next week, which he could not meet — was in a tight place — and as the plaintiff had a mortgage, he might do as he thought fit. The plaintiff delivered up the old note and mortgages, Whitney gave a new note, secured by a new mortgage upon the goods then in the shop, which included, as the plaintiff testified, one-third of the original stock, but there was no evidence by which it could be separated and identified. The plaintiff took possession of the goods, under the new mortgage, and subsequently the goods were seized by the defendant, under a warrant issued by the judge, of insolvency.

The only question in the case, was whether the plaintiff could rely on the first two mortgages, executed to him. The last mortgage was held invalid, for the reason that it was given in contemplation of insolvency, and received by the plaintiff when he had reasonable cause to know that the mortgagor was insolvent. The only question in the case, then was, whether the original mortgage had been abandoned by the parties, and upon the answer to that question, the entire case turned.

The court upon that point say: "But the difficulty which "the plaintiff has to encounter, in asserting a title under "these mortgages is, *that on the facts in proof, it appears that "they were no longer in force between the parties, but were given "up when the last mortgage was made.*"

In the case at bar, the facts are directly the reverse. The court specially found, by the sixth finding, "that at the time of "the execution and delivery of said bill of sale, no agreement "was made, or entered into, for the cancellation or surrender "of the said contract of January 25, 1868; nor was the same "surrendered or delivered up by the defendants, to the said "Blake, but the defendants held and retained the same."

In *Paine* v. *Waite*, the court further says: "It is not a case, "therefore, where a new and additional mortgage is given on a "stock of goods, as cumulative security in connection with "previous mortgages on the same property, to the same person, "which are still to continue in force. *Such might have been "the legal effect of giving a new mortgage, if nothing had been "said between the parties concerning the prior mortgages.* But "it is a case where an old security is abandoned and given "up, and a new one taken as a substitute for that which pre-"viously existed."

It would be difficult to find two cases more dissimilar in their essential particulars, than *Paine* v. *Waite*, and the one at bar. So far from establishing the proposition contended for by plaintiff, the case cited must be considered as directly opposed to it. The court expressly say that the last mortgage might have been considered as cumulative security merely, had nothing been said between the parties concerning the prior mortgages. But, here the court expressly finds, as a matter of fact, that nothing was said concerning the prior contracts, that no agreement was made for their cancellation; that they were not delivered up to Blake, and that they were retained, and held by the defendants.

The conclusive evidence in *Paine* v. *Waite*, that the parties intended to surrender and abandon the previous securities, was, that they were, in fact, surrendered and abandoned. The original note and mortgages were, in fact, delivered up to the debtor. The execution of the new mortgage could not be considered as cumulative security, because no security, whatever, was retained by the creditor upon which it could cumulate. He took possession of the mortgaged property, not under his original securities, for the very satisfactory reason that he did not have them; they had been surrendered to the debtor. As a matter of fact, and so stated, the plaintiff, in *Paine* v. *Waite*, "*took "possession of the goods under the new mortgage.*" The simple question then was, whether the possession, *thus acquired*, could be maintained against the claims of the messenger of the court of insolvency. That the new mortgage was fraudulent and void,

was indisputable, and hence no rights could be acquired under it. No rightful possession of the property in controversy, as against the claims of other creditors, could be acquired under that mortgage, because it was void; no rightful possession could be acquired under the previous mortgages, because they had been surrendered and delivered up. No possession was, in fact, acquired under them, and the simple inquiry was, whether under the new mortgage, because, *under that alone* were the goods taken, had the plaintiff acquired the rightful possession of the property. That new mortgage being void, there could be, as there was, but one answer to the question. But, let us suppose that the plaintiff, in that case, had retained in his possession the old note and mortgages, and *that with those*, as well as the new mortgage, he had taken the goods. It could hardly be contended, that because one instrument, under which he acted, was invalid, that, therefore, he could acquire no rights under others, which confessedly were valid. If, upon taking possession, he had done so under *all* his mortgages, then the question would have been, whether, under *any or either of them*, he had the right so to do.

But, in the present case, no doubt whatever exists, or can exist, that possession of the logs was held by Hackley, under the contract of January 25. By the terms of that instrument, as well as of the contracts preceding it, the right of possesion was vested in Hackley. The first contract between the parties, made September 4, 1867, provides as follows: "Right "and possession of all the within mentioned logs and lumber, "is hereby retained in the said Hackley and Sons, as fast as "the said logs are cut and banked."

The last contract, bearing date January 25, 1868, although actually made in November preceding, provides that the said "Hackley & Sons shall be deemed to be in possession of said "pine sawlogs, and the right of possession is hereby vested in "them, until the said sum of money shall become due and paid, "as aforesaid." Not only was the right of possession thus vested in the appellees, but, at the time the bill of sale was made, they were actually in possession of the logs, and were proceeding to

manufacture them into lumber, and had already manufactured and sold under said contract four million feet of lumber.

Before the execution of the contract of May 25, Blake had banked and put into the river all the logs cut by him that season, amounting to 13,799,244 feet. *Before the execution of that contract these logs were all in Hackley's possession*, and hence it is impossible to claim that such possession was acquired under the bill of sale. The validity of the contract of January 25, being undisputed, and the defendants having acquired possession of the logs under it, it follows, as a necessary consequence, that the original taking was lawful, and, in that most essential particular, this case differs from *Paine* v. *Waite*. In the latter case, possession was taken under a void and fraudulent mortgage, there being at that time no other mortgage in existence. In this case possession was taken under a confessedly honest and valid agreement, there being at the time no fraudulent nor invalid agreement in existence.

Another broad distinction between this case and *Paine* v. *Waite*, is to be found in the fact, that the logs here in controversy were actually cut, banked and put into the river by means of advances made to Blake by the defendants. The logs in their possession are the identical logs described in the contracts, and upon which they had an equitable lien for the re-payment of advances. But in *Paine* v. *Waite*, the property covered by the fraudulent mortgage was not the same as that described in the original one. It was not even claimed that the goods covered by the new mortgage were the same as those embraced in the original one. The plaintiff himself only claimed that one third of the original stock was covered by the new mortgage; and there was no evidence in the case, by which they could be separated and identified.

How then, under such a state of facts, could it be claimed that the last mortgage was merely cumulative security? It was not upon the same property as the original one; and the court failed to find that there was any agreement that the mortgage first given was to be renewed, from time to time; or that

there was any stipulation to that effect, when the first mortgage was made.

Thus much, for the case of *Paine* v. *Waite*.

I am entirely unable to discover how the case of *Carr* v. *Hilton*, (1 Curtis, C. C., 230), has the slightest bearing upon the point under discussion. In that case, a bill in equity was filed by the assignee of a bankrupt, against the defendant, to whom it was alleged the bankrupt had, before the passage of the law, made fraudulent conveyances of certain real estate for the purpose of defrauding his creditors, and that he procured, in exchanging lands, certain conveyances to be made to one of the defendants in trust for his benefit, and with out consideration. The bill was demurred to, on the ground, among others, that these transactions, being all prior to the passage of the bankrupt law, and there being no averment that either of them was made in contemplation of bankruptcy, or of the passage of a bankrupt law, no title passed to the assignee; and he could not sustain the bill.

The court simply held, that the rights of the assignee were not merely those which the bankrupt possessed, and that although the bankrupt could not himself have maintained a bill in equity, for the purpose of setting aside his own fraudulent conveyance, yet "when the assignee sues, the case is reversed: "to grant the relief, is to act in accordance with these rights "of creditors, and in opposition to the contemplated fraud, "while to refuse it, would be to aid in its perpetration."

As to the point, that the conveyances were made prior to the passage of the act, the court held: "A fraudulent conveyance "is no effectual conveyance as against the interest intended to "be defrauded. This interest the assignee represents, so far as "respects all creditors who have proved their claims."

These were the points adjudged in that case. There is no question made upon those points here. It is not denied, that in so far as the conveyance of May 25, 1868, is held to be fraudulent, as against the creditors of Blake, the assignee stands in the position, and as the representative of those creditors. The inquiry is not whether, at the suit of the assignee, the conveyance

of May 25, can be set aside as fraudulent. That point in the case was long since passed, and the conveyance was set aside as fraudulent. The real problem is in setting aside a fraudulent conveyance, how were the defendant's rights affected which he claims under a valid conveyance—one which the court has declared to be valid—one which the counsel admits to be valid?

In the solution of this, the real problem in the case, *Carr* v. *Hilton* does not furnish us the slightest assistance, and it sheds no light upon any question, now, or at any time, involved in this case.

The case of *Cox* v. *Wilder*, (5 Nat. Bank Reg., 541), also cited by plaintiff, is not in point. In that case, the bankrupt made a fraudulent conveyance of a certain farm, in fee. The deed was offered for record by the grantee, and then withdrawn. The assignee of the bankrupt filed his bill against both the grantor and the grantee to set aside the deed, and subject the property to the payment of the debts of the bankrupt, freed from both dower and homestead interests. No re-conveyance had been made to the bankrupt.

The questions in the case, were, whether the bankrupt, in endeavoring to perpetrate a fraud, had divested himself of all his interest in the property as a homestead? Whether, by his fraudulent conveyance, he had placed himself beyond the protection of the homestead exemption, and was estopped from asserting it, and whether (his wife having joined with him in the deed) her dower right had been so divested, that the assignee in bankruptcy would take the property freed from that right.

The District Judge held, that by the conveyance, all the rights of the bankrupt and his wife were divested, and that the assignee took the same free and discharged of the homestead claim of the bankrupt, and the dower claim of his wife.

It is difficult to see how the doctrine of merger can, in any way, be involved in this case. No conveyance had been made by the bankrupt and his wife, or either of them, preceding the one declared fraudulent. In that respect, the case stands precisely as if the sole evidence of title upon which the defendants in error, in the case at bar relied, was the fraudulent bill of sale

of May, 1868, and that no previous contracts existed between the parties. In *Cox* v. *Wilder*, there was no merger, and could be none, for there were no previous conveyances to merge. Moreover, the conveyance alleged to be fraudulent, and so found to be, was made without any consideration whatsoever, *it was intended to secure advances to be made, but which were never made.* In that respect, it is hardly necessary to comment at any length upon the distinction between the two cases. Here the original contracts were executed to secure advances, which were actually made to the full extent required by the contracts, and when the instrument of January 25 was executed, thousands of dollar shad already been paid. So, that these facts, taken together, *Cox* v. *Wilder* stands precisely as if we relied solely upon the bill of sale of May 25, and had never, at that time, nor at any time thereafter, advanced a dollar upon it. But I apprehend that the real point upon which *Cox* v. *Wilder* is cited is, that by the fraudulent conveyance, the bankrupt was estopped from asserting either the dower rights of his wife, or his homestead interest, and that, for the same reason, by the fraudulent bill of sale, we lost all our rights under our contracts with Blake.

From this point of view, there is no similarity between the two cases. Whatever rights the grantee of the bankrupt acquired to the dower and homestead interests, was derived from the single conveyance made to him, and from that alone. *Cox* v. *Wilder*, was appealed to the circuit court. On appeal the ruling of the district judge was overruled. Judge DILLON holding, (7 Nat. Bank Reg., 241), as to the dower interest of the wife: "As against the grantee she is estopped by her deed to claim "dower, but the estoppel cannot operate in favor of or be "claimed by a stranger or third person, under whom the com- "plainant or adverse person does not derive or claim title.

* * * We solve the question here presented, as to "dower, when we determine under whom the assignee claims, "and to whose rights he succeeds. * * *

"He claims not under but adversely to the deed of Wilder. "He succeeds to all the interest of the bankrupt, and represents "his creditors so far as to enable him to attack conveyances

" made by the bankrupt in fraud of their rights. He claims that " the deed is void, as to creditors, and on this ground alone " attacks it, and upon this ground alone has he any rights to the " property. He says it is void as to creditors because fraudu- " lent and for this reason asks to be invested with the title, which " it fradulently conveyed. He cannot claim *under* it and *must* " claim *against* it. When it is decreed to be fraudulent at his " instance, how can *he* set it up to defeat the right of the wife " to dower? Such a position involves this inconsistency, viz: " that it asks that the same instrument be held void as to credi- " tors, and then in their favor held valid as to the wife."

As to the *homestead right*, Judge DILLON holds this language:

" Similar considerations in my judgment, apply to the home- " stead right. * * * Exempt property does not " pass to the assignee, and the bankrupt law exempts, *inter alia*, " from the operation of the assignment, all such property as was " exempt from levy and sale upon execution by the law of the " State, to an amount not exceeding that allowed by the State " Exemption laws in force in the year 1864. * * * The " homestead is the place where the family reside—the *home*; " and since the exemption is allowed only to the head of a " family, it is obvious that the provision is not made solely on " account of the husband, but has in view also the wife and " children—the family. * * * Except for the deed " to Wilder, the bankrupt would be entitled to the exemption. " But as we have seen, the assignee does not, and cannot claim " under that deed, but in hostility to it; and when it is avoided, " and the title placed in the assignee, I do not think (in view of " the purpose of the exemption) that the husband is estopped as " against the assignee to claim the right to the homestead, or " the value to the extent given by the statute. This view does " not make the estate any less than if the fraudulent conveyance " had not been made, while the opposite view gives the creditors " a profit out of the attempted fund, at the expense of the family " for whose benefit the exemption is mainly if not wholly pro- " vided."

The judgment of the District Court was reversed.

The only effect so far as I have been able to discover, resulting from declaring a conveyance made by a bankrupt fraudulent, is that so far as the property conveyed is concerned, it leaves the bankrupt precisely in the position he would have occupied had no such conveyance been made. In *Cox* v. *Wilder*, the bankrupt had at the time of the fraudulent conveyance executed by him, title to the property subject only to the dower interest of his wife and the homestead right. That conveyance being wiped out, precisely that title remained, no more and no less. His original interest was not lessened by his fraudulent conveyance, nor was it enlarged. The assignee could only reach the interest of the bankrupt, and it might as well be contended that by a fraudulent conveyance of property which he did in fact own, a bankrupt would acquire title to property which he never owned, as that by such conveyance he would for the interests of the creditors, acquire a larger title than he before possessed.

Applying Judge DILLON's doctrine to the case at bar, the assignee acquired all the interest in the logs which Blake possessed at the time he executed the bill of sale of May 25th. In other words, his interest was entirely unaffected by that instrument. The inquiry is thus narrowed down to this single point: "What was Blake's interest at that time?" If he had previously conveyed it away in good faith, his fraudulent bill of sale would surely not operate as a re-conveyance, and that he had thus conveyed it is undisputed and indisputable. In *Cox* v. *Wilder*, the bankrupt, at the time of the fraudulent conveyances made by him, held the title to the property, subject to the dower and homestead rights. In setting aside that conveyance, Judge Dillon holds that he held the same title, subject to precisely the same rights.

At the time of the execution of the bill of sale of May 25th, Blake had merely an equitable interest in a certain proportion of the proceeds of the logs. He had neither title, possession, nor right to possession thereof. Under the same rule in setting aside that conveyance, he held only the same interest.

In *Cox* v. *Wilder*, the bankrupt's wife had, at the time of the

fraudulent conveyance, a dower interest in the property. That conveyance being set aside, she was held to possess it still. In this case, Hackley had the possession of the logs and a title thereto to the extent of, and as security for his advances, and by the same reasoning, after the bill of sale was set aside, he would continue in the same position.

So far as any comparison can be instituted between the two cases, Hackley occupies here the same position as the wife of the bankrupt in *Cox* v. *Wilder*, but with this material distinction. In that case, the wife actually joined in conveying away her dower interest, with her husband, and yet the court held that upon setting the conveyance aside, her dower right was unaffected. But Hackley has made no conveyances of the rights which he acquired under the contracts. Blake could not, by any conveyance which he could make, affect Hackley's interest. Had Blake undertaken to convey title to the logs to some person other than Hackley, it is very clear that, whether fraudulent or not, such conveyance would not in the slightest degree have impaired Hackley's title. The title of the latter was not strengthened by the bill of sale, and under the ruling of Judge DILLON it was not weakened by it, nor in any way changed or affected.

This concludes the list of authorities cited by plaintiff in error in support of his proposition, that the contract of January 25th was merged in and extinguished by the new contract of May 25th, and we submit that these authorities fall very far short of sustaining that position. Indeed if they can be regarded as at all applicable, they tend to the opposite conclusion, for, as we have seen in *Paine* v. *Waite*, the court substantially held that, had there been no distinct abandonment and surrender of the original securities, they would not have been affected by the fraudulent mortgage; and in *Cox* v. *Wilder*, that the rights and interests of the bankrupt were not in any degree affected or changed by his fraudulent conveyance.

The plaintiff's counsel denies our rights under the contract of January 25th, because, he says, that was merged "in and ex-"tinguished by the new contract of May 25th," and he denies our rights under that contract because, as he says, "it is void as to

"creditors." The fallacy of this method of reasoning is obvious.

If the contract of January 25th was merged and extinguished, it could only have been as an effect of the subsequent bill of sale. But the bill of sale, being void, has no operative power whatever. It conveyed no title as to Hackley, because it was void. It extinguished and merged no pre-existing contracts, for the same reason. It cannot be held valid to the extent that it operates against Hackley, and void so far as it could be operative in his favor. A pre-existing valid contract cannot be merged and extinguished by a subsequent invalid and fraudulent one. The bill of sale having been set aside as fraudulent, Hackley can claim no rights under it, nor can Blake's creditors. It aids no one, and it injures no one.

Counsel claims that between the parties it was valid, but this proves nothing to the point, for every fraudulent conveyance is valid as between the parties. But I am utterly at loss to see how this principle aids them. The defendants in error must either stand by or renounce the bill of sale. If, as they insist, it was valid as between the parties, then Blake had no equities nor rights whatever in the logs, nor in the proceeds thereof. Under that bill of sale, Blake could have recovered nothing whatever against Hackley, even had he realized from the sale of the lumber thousands of dollars in excess of his claims against it under the previous contracts. Are the plaintiffs in error anxious to place themselves in that position? If, as they contend, the contract of Jan. 25, was merged in the bill of sale, and they are at liberty to avail themselves of such merger, then they must accept all the consequences which flow from it. The effect of such merger would simply be to prevent Blake from asserting against Hackley any interest whatever in the logs, or in the proceeds thereof. But it is because the bill of sale does not as to the creditors work such a result, that Blake's interests are preserved intact, and they, succeeding to those interests, can recover in a proper form of action, all that the Hackleys have realized from the sale of the lumber in excess of the charges which they have against it under their contracts. Plaintiffs' counsel, in his argument, cites and comments upon various authorities to the point

that the bill of sale, although voidable by the act of the creditors sought to be defrauded, was as between the parties to the instrument, valid and binding.

We make no controversy with this position, but entirely disagree with the conclusions which counsel draws from it. He says (*Argument*, p. 19): "It is therefore insisted with confi- "dence, that the conveyances and transfers made on the 25th "day of May, 1868, although fraudulent and void, as to the "creditors of Blake, are nevertheless valid between the parties, "and as a necessary consequence, it follows that the mortgage "debt was paid and the mortgage lien extinguished."

Now, if the transfers of the 25th of May were void as to the creditors of Blake, they were void to the extent of all the consequences which flowed from them, and all the interests which Hackley acquired by or through them. The validity of the conveyance is limited to the parties to it, and if the mortgage debt is paid as between Hackley and Blake, it is only as between them, it is not paid as to the creditors, for the payment of the debt, vests in Hackley an absolute title; this he only acquired by the bill of sale, that as to the creditors is void, and it is because the bill of sale does not as to the creditors have the same effect that it would have between the parties, that the creditors are in a position to question it at all. But the plaintiff's counsel contends that the contracts were abrogated by the bill of sale. Let us assume, for the purposes of the argument, that in that position he is entirely correct, how is his case aided. Suppose that all the contracts had been voluntarily cancelled and surrendered up to Blake, that would not have operated as a reconveyance to him. Hackley had possession of the logs. He had made advances upon them. They were in his possession to secure him against those advances. Under such a state of facts, what rights would Blake have? The question is not so much whether the contract was abrogated, as whether Hackley's rights to the property, growing out of his possession of it, voluntarily delivered to him by Blake, as security for advances made upon it, were abrogated. Let us suppose that no contract whatever had been made between Blake and the defendants, yet

being in actual possession of the logs, and having advanced money for the purpose of cutting and floating them to be manufactured, the law would allow the defendant to retain possession until the advances thus made had been repaid to them. It can hardly be contended that the defendants' situation is worse because of the contract of Jan. 25, than it would have been had no such contract been made.

Having thus far discussed the plaintiff's authorities, and the line of reasoning pursued by him, we direct attention to the facts in the case, and the points relied upon by the defendants, in support of the rights which they assert, and of the judgment of the Circuit Court in their favor.

The defendants were lumber manufacturers at Muskegon, Michigan. Alexander Blake, the bankrupt, was engaged in the lumbering business, furnishing logs to be manufactured into lumber, and for several years prior to the year 1868, had entered into and performed logging contracts, with the defendants. On the first day of August, 1867, Blake and the defendants entered into a logging contract, which was reduced to writing, and bore date, September 4, 1867, in and by which, it was agreed that Blake was to furnish the defendant, to saw on shares, six million feet pine sawlogs, to be put into the Muskegon river, by Blake, during the winter of 1867 and 1868, and to deliver the logs at his own expense, at the booms of the Muskegon Booming Company.

The defendants agreed to saw the logs for one-half the lumber they produced, the lumber to be sent forward to market, and sold; the net proceeds to be equally divided between the parties. The defendants also agreed to advance to Blake, the sum of three dollars per thousand feet, board measure, to enable him to put in the logs; all the money so advanced, to be applied solely to the prosecution of the job, and to no other purpose. Blake was to pay interest on the advances, at the rate of ten per cent. per annum, and the advances and interest thereon, to be repaid to Hackley, from the proceeds of the first lumber sold. The contract also provided that the "right and "possession of all the within mentioned logs, and lumber is

" hereby retained in the said Hackley and Sons, as fast as the " said logs are cut and banked."

This contract was changed from time to time, until finally, on the 25th November, 1867, an agreement was entered into which was reduced to writing, executed and bearing date, January 25, 1868, increasing the amount of logs to be put in by Blake, to eighteen million feet, and providing for an advance of *four* dollars per thousand. In addition to the original contract, the latter one contained a provision, that Blake, for the purpose of securing payment of said advances, and the interest thereon, had granted, bargained, and sold to the defendants, all the pine sawlogs mentioned in the contract, in the river, on the river bank, in the woods where the same were cut and being cut; the advances to be paid on or before Dec. 1st, 1868, and the defendants were to be deemed in possession of said sawlogs, and the right of possession was thereby vested in them, until the advances should become due and be paid.

Under these contracts, the defendants advanced to Blake, between August 1st, 1867, and January 25th, 1868, the sum of $41,066.86. At the time the contract was made, there was due, from Blake to Hackley and McGordon, $21,669.63, on account of advances made to Blake, on a logging contract for the preceding year, which on the settlement with Blake, on the 1st day of January, 1868, was incorporated in the account of said Blake, with said defendants, for that season, and charged up against Blake, and a statement of account forwarded him; and that between the 25th day of January, 1868, and the 25th day of May, 1868, the defendants advanced to Blake, under the contract, the sum of $15,184.89, thus making a total of $77,921.88.

Under said contracts, Blake banked and put into the Muskegon river, before May 25th, 1868, thirteen million, seven hundred and ninety-nine thousand, two hundred and forty-four feet of logs, which were manufactured into lumber by the defendants, during the year 1868. Up to May 25th, the defendants had manufactured from said logs, four million feet of lumber,

shipped it to Chicago, and there sold it. The defendants manufactured all the logs into lumber, sold the same in Chicago, and realized from such sale, the sum of $126,408.16, thus leaving, exclusive of commissions, interest on advances, and other expenses, a balance in defendants' favor of over $14,000.

Owing to a rapid decline in the price of lumber, Blake was unable to go on; so informed the defendants, and, at their suggestion, made an absolute bill of sale of the logs, together with a large quantity of other property, real and personal, to them. No agreement was made for the cancellation or surrender of the contract of the 25th, nor was the same surrendered up, but after the execution of the bill of sale, the defendants sold the logs, on their own account. Bankruptcy proceedings were instituted against Blake. In June, 1868, Blake was declared a bankrupt. The plaintiff was appointed assignee, on June 25th, 1868. In a suit brought by the assignee, he recovered against the defendants, for the value of the personal property, aside from the logs, and the real estate was conveyed to him by the defendants.

At the time of the execution of the bill of sale, May 25, 1868, the logs were in the Muskegon river, and in the Muskegon Company's booms. The Circuit Court adjudged the bill of sale to be fraudulent and void, but found that the defendants' interest in the logs, arising out of the contracts and the advances made thereon, were not affected by it.

The Circuit Court held that all the contracts preceding the one executed January 25th, were merged in that. Upon these contracts, and the advances made under them, the defendants rest their claim. It will not be forgotten that this is an action of trover. The first averment in the declaration is that on the 26th day of May, 1868, Blake was lawfully possessed as of his own property, of the logs described therein. This averment is negatived by the findings of the court, and by the contracts themselves. Blake was not then possessed of the logs They had, at that time, all been cut, and were either in the river or in the booms. He had agreed that the defendants should have the possession, and the right of possession, and, after the advances were made, it is entirely clear, that had

Blake, while the logs were in the river, undertaken to divert them from their proper course, the defendants might at once have seized the logs, taken them to their own mill, and there sawed them into lumber. In driving the logs to the booms Blake was acting merely as the agent of the defendants; his possession was their possession. It is unnecessary to inquire what the state of the case would have been had Blake undertaken to transfer them to some third person, for the assignee stands, so far as the possession and right of possession of the logs is concerned, in Blake's shoes, and if Blake would not have had the right of possession, as against the defendants, neither would the assignee. The logs were not the property of Blake. He had transferred the title to the defendants, by the contract of January 25th, and had no interest whatever in the logs themselves, but only an interest in one-half the proceeds of the sale of the lumber manufactured therefrom, after paying the advances, and interest thereon, and his proper portion of the costs and expenses attending the sales.

Nor is the plaintiff's case any better, so far as the averment of converstion is concerned. Having the logs in their possession, it was not only the defendants' right, but their duty, under the contract, to proceed to manufacture them into lumber, and to ship and sell the lumber. At no time after the advances were made and the lumber was cut, could Blake have interfered with the defendants, in sawing the logs and in selling the lumber after it was sawed. The demand made by the assignee could not place the defendants in the wrong. They had no right to make any demand, and the defendants were under no obligation to comply with it when made. In making the demand the plaintiff recognized the fact that the logs were in Hackley's possession, and had Blake, instead of the assignee, demanded the logs, it is clear that Hackley would have been under no obligations whatever to surrender them up. He proposed to do, and did do with the logs precisely what Blake agreed he might do, and what it was necessary should be done, in order to realize the advances. Blake could demand nothing, until the logs were sawed, and the lumber sold; and even then he could demand

nothing, except his share of the proceeds, which, as it turned out, amounted to nothing, but left him still indebted to the defendants, in the sum of over fourteen thousand dollars.

It is not pretended, by the plaintiff, that the defendants took possession of the logs under the bill of sale, for they had possesion, coupled with a right of possession before that instrument was executed, and had already maufactured from the logs, and sold, four million feet of lumber. Thus having possession of the logs, it is a matter of no consequence whatever, whether they sawed and sold them, under the contract, or under the bill of sale. They had a clear right to saw, and the clear right to sell, and, the fact being that after the lumber was all sold, there was nothing coming to Blake, reduces that feature in the case to the smallest possible proportions.

But, the plaintiff insists that after the execution of the bill of sale, the defendants claimed to be the owners of the logs. So they did, and so they were. Blake had not a dollar's interest in them, even under the contracts. The findings show that the prices of lumber had, at that time, largely declined ; that Blake and the defendants estimated the quantity of logs not then manufactured, placed an estimate upon the then value of the logs, figured up the advances, and thus determined what, if any, interest Blake possessed in them. He, in fact, had, at the time, not one dollar's interest in the logs. Under the contracts, the defendants were the absolute owners of them, and they might well, considering the disastrously low prices at which lumber then ruled, and the large advances which they had made, claim, as they did claim to be, the absolute owners of the property. The claim thus made by them was well founded, and the event fully justified them in making it.

True it is, also, that after the 25th day of May, the defendants sold the lumber on their own account. It is entirely immaterial whether they did so or not. They might have sold it all so, but the manner of the sale would not, in the slightest degree, have affected Blake's rights. They had the right to sell the lumber under the contracts. There was nothing in the contract of January 25, 1868, requiring them to sell on joint account.

The only provision upon that point is this: "All of the lumber "manufactured from the within mentioned logs, is to be sent "forward to market, and sold to the best advantage; the net "proceeds of all such sales to be equally divided between the "parties to this agreement."

There is nothing in the record to show how the defendants sold this lumber prior to May 25, save what is stated in the special findings, that after that time, they *ceased* to sell on the joint account of themselves and Blake, but sold the same on their own account alone. The defendants being at no time under any obligation to sell the lumber upon joint account, and being required only to divide the proceeds of the sales, and, there being nothing in the case to show how they had sold the lumber, it seems to me idle to treat this fact entirely immaterial, so far as Blake's interests were concerned, as evidence that the defendants intended to, and did surrender, all their rights to the property secured to them by their contracts, and for which they had so dearly paid.

But, however the lumber might have been sold, it is obvious that there was no difficulty in ascertaining just how much lumber the logs produced, and precisely how much was realized from its sale. These facts were all in evidence—there is no controversy concerning them, and the court has found them.

But, I contend, that under all the circumstances of the case, the defendants had the clear right to strengthen their hold upon the logs by any additional security which they might desire. If, as a matter of fact, considering the prices at which lumber then ruled, and the amount of advances which they had made, nothing would be left to Blake after the lumber was manufactured and sold, then the defendants were, in fact, the absolute owners of the logs, and had a right, under such a state of facts, to receive from Blake an absolute conveyance thereof. Such a conveyance would amount to nothing more than the conferring of a title by Blake, which the law, under the facts as they then existed, had already vested in the defendants. It was merely the declaration, by Blake, of the defendants' rights, to an extent which the law, under the facts, had already declared.

By the bill of sale, Blake gave to the Hackleys, nothing but what the law had already given them. He vested in them, an interest which was theirs without any further conveyances or assurances from him. Had he, by the bill of sale, endeavored to clothe them with a larger interest in the logs, than they then, in fact, possessed, the case might have been, and probably would have been, so far as the bill of sale was concerned, different. But he attempted to do, and did do, nothing of the kind. I am constrained to believe, that even a bankrupt has the right to deliver to any person, property which actually belongs to him; that he may accompany such delivery by written evidence of such rights; that having, before his insolvency, actually parted with the title to property, he may, after his bankruptcy, furnish to his grantee, the written evidence of such transfer, and that it is impossible to predicate a fraud upon any such transaction.

I insist, therefore, that so far as the logs were concerned, the bill of sale of May 25th, 1868, was not fraudulent; that the facts found in the case, lead to that conclusion and to none other; that the property described in that instrument, being of various kinds, it is susceptible of division, and can be held as has frequently been done, fraudulent and void, as to a portion of the property described in it, and valid as to the remainder.

The general views which we have here advanced, are abundantly supported by authority. The principle is well established, that a party having a valid title to, or lien upon property, and purchasing an outstanding claim or title thereto, which fails by reason of fraud in the grantor; upon the failure of the purchased fraudulent title is remitted to his original valid title or lien, and loses only his title under the purchase.

Thus, *In re Kahley*, 4 B. R., 124, the court says:

" But notwithstanding the sale was void, and Ilgen not enti-
" tled to the property under it, is against the creditors, still, I
" think he has the right to assert his lien, by virtue of his mort-
" gage, so far as that is valid. I do not think his purchase,
" which the creditors have a right to avoid, impairs his rights
" under his mortgage. But on the title failing, that he sup-

" posed he got by the purchase, I think he would be restored " to his rights as mortgagee, as they existed when he at- " tempted to purchase. His title under the purchase, he would " lose, and nothing more."

In the case of *Ladd* v. *Higgin*, 35 N. H., 428, the court say:

" In the case before us, the statute makes the absolute con- " veyance void; that is to say, voidable at the election of the " grantor's creditors.

" When those creditors avoid this absolute conveyance, the " law remits and restores the other party to his previously-ex- " isting legal rights, This gives the statute its proper and legit- " imate effect, permits the purchaser to hold nothing by his " fraudulent contracts, and the creditors to take all their debtor " fraudulently conveyed, and nothing more. To give it any " other construction, would be to create penalties beyond those " contemplated by its enactment, and compel the fraudulent " purchaser to surrender, not only all he may have fraudulently " purchased, but his previously-acquired *bona fide* securities on " the property.

" The presumption of payment was rebutted by the finding of " the jury. The note was given up, upon the taking of the " fraudulent conveyance, and the debt included in that convey- " ance which the creditors have now avoided.

" The very avoiding of the fraudulent conveyance revived and " renewed the former valid lien — restored the parties to their " original position."

And see authorities there referred to.

It will be observed that the facts in the case last cited, were very much stronger than in the one at bar.

In that case, the original had actually been surrendered and delivered up, and the debt represented by the note was included in the fraudulent conveyance. Yet, there having been, as a matter of fact, no payment of the original debt, the court held that it was revived by the overthrow of the mortgage given to secure it.

In the case of *Towle* v. *Hoit*, 14th N. H., 63, the facts were as follows: A gave to B, a mortgage on certain real estate,

which mortgage was assigned to C. Subsequently A gave to C a mortgage upon the same property. A, being in want of more money, applied to C, and obtained from him $165, in money, and his note for $35, which was returned to C. The evidence showed that A was indebted, and about to be sued, and it was agreed that upon payment, by A to C, of the amount of the two mortgages, and the money advanced, C should reconvey the lands to A. The plaintiff claimed the land by virtue of a levy under execution against A.

PARKER, C. J., says: "Cases which go to show the warranty "deed, given to the defendant (C) in this case, to be void "against creditors, are numerous. (Authorities cited.) But be- "ing thus void, it cannot have operated to merge the second "mortgage, which ran directly to the defendant.

"The deed was simply void against creditors by reason of "the understanding between Hill (A) and the defendant. The "transaction had nothing in its nature to taint any prior con- "tract, made in good faith between the parties, as to the same "property. The defendant cannot be said to have forfeited his "valid claim, by taking another which is invalid. There was "no connection between them, and there does not appear to "have been any agreement between the parties for the dis- "charge of the mortgage. The deed and the mortgage are "separate sources of title, and each is to be judged by itself."

In the case of *Stedman* v. *Vickery & Trustees*, 42 Maine, 136, the brig Black Hawk was mortgaged to the trustee, and on the same day he received an absolute bill of sale. The bill of sale was made to enable the trustee to sell, and relieve himself of the liabilities he had incurred for the debtor. And the court say:

"If the bill of sale were to be regarded as void, still it is not "readily perceived how the giving of a void bill of sale would "defeat a previous valid mortgage; or why, if void, it should "be upheld merely to destroy an honest claim. It has never "been cancelled. The trustee entered into possession of the "property mortgaged; and it would be a strange result if he "were to lose security, otherwise valid, by an act which was "either voidable, or if valid, strengthened and enlarged his

" prior rights. It would seem, according to *Ripley* v. *Otis*, 6 " Pick, 475, that even if the bill of sale were to be regarded as " fraudulent in fact, still the trustee would be entitled to hold " the property to secure himself against his original liabilities."

In the case of *Hoyt* v. *Dimon*, 5 Day, 483, the court say:

" The mortgage, then, is valid, unless defeated by the abso- " lute deed from Austin Nichols to Philo Norton, the mort- " gagee. This, it is claimed, absorbed the mortgage, though " void as to creditors, *it being good between the parties.*

" The question on this branch of the case, can only arise on " the ground, that the absolute deed is fraudulent; for the mo- " ment we admit its application to the mortgage, as payment of " that, either by express contract, or legal inference, we admit " a legal consideration which may give validity to the deed. " For if given and received *bona fide*, for a good and valuable " consideration, as it would be, if given in discharge of a pre- " existing mortgage of equal value, the title under it would be " unquestionably good. Admitting then, that this later deed " was executed without consideration, and with the fraudulent " intent to defraud creditors; it is, as to them, by statute, " utterly void. It can have no effect as to creditors. Their " claim on the property still remains as though the deed did " not exist; of course, it can have no effect, by legal inference, " to absorb the mortgage debt. They must take the estate " (as it was before such void deed was given), subject to the " mortgage."

White v. *Gainer*, 2 Bing., 23, was trover by the assignee of a bankrupt.

The defendant was a miller of cloth, having in his possession several pieces of cloth belonging to the bankrupt, but upon which he had a lien, and the bankrupt was indebted to him, for milling, dying, and ironing it and other cloths, to an amount much exceeding the value of the cloths then in his possession. The bankrupt was insolvent, and hearing that a bailiff was in his house, went to sleep at the house of the defendant, and while there, sold him the pieces of cloth in question, together with several others, delivering a bill of parcels, bearing date,

a few days before. Commission was issued against Symes a few days thereafter, and he was declared bankrupt. The plaintiff, as assignee, demanded the cloths in question, of the defendant, who refused to deliver them up, saying: "He might as "well give up every transaction of his life." It was contended on the trial, that the defendant's lien, as far as he had any, was merged in the purchase of the cloths, and that at all events, he had waived it by not making any claim in respect of it, when the cloth was demanded.

The judge directed the jury, that the plaintiff, previously to their demand, ought to have tendered at least, the amount of the lien, for the workmanship on the cloths in dispute, but he reserved the point as to the merger of the lien.

On deciding the motion for a rule *nise* to set aside the verdict, BEST, C. J. said: "It has been urged that he (the defendant) "bought the cloths after the bankruptcy. If that were so, he "stands in the same situation as every other purchaser, under "the same circumstances, the purchaser is liable to restore "them to the assignees, but the assignees must take them sub-"ject to such rights as had accrued previously to their claim, "and the bankruptcy of the bailor will not deprive the defend-"ant of the right to which he is entitled — the right of lien. It "might have been otherwise, if the defendant, when called on "to surrender the goods, had relied on the purchase, but this "was not the case, and the verdict must stand."

In the case at bar, the court finds that the assignee demanded the logs of the defendants, and it is averred that the defendants refused to deliver them up. It does not appear that he placed his refusal upon any special ground, nor, so far as the findings are concerned, does it appear that he did refuse. But however that may be, the case falls directly within the rule laid down by Chief Justice BEST in the case last cited. The defendants had a lien upon the logs to the extent of their advances, and the plaintiff, as assignee, could make no effectual demand without accompanying it with a tender of the amount of the lien. That the bill of sale was made in contemplation of bankruptcy, does not affect the case, because, as the court in the case last cited

holds, the bankruptcy of the bailor will not deprive the defendant of the right to which he is entitled, the right of lien. In the case cited, the bill of sale, as such, was clearly void as made in contemplation of bankruptcy; it was claimed there, as it is here, that the defendant's previous lien had merged in the purchase, but it was there held that the purchase did not of itself operate as a merger, and there being no other evidence showing a waiver of the lien, the defendant was held entitled to retain the property under it. We refer also to the following additional authorities:

Britt v. *Aylett*, 6 Eng., (Ark.), 475.
Mead v. *Combs*, 4. C. E. Green, (N. J.), 112.
Ripley v. *Severance*, 6 Pick., 474.
Sawyer v. *Turpin*, 5 Bank Reg., 339.
Porter v. *Eastman*, 14 Wis., 39.
Stockoe v. *Cowan*, 29 Beav., 637.
Meshke v. *Van Doran*, 16 Wis., 319.

I do not deem it necessary to attempt to review the counsel's commentaries upon the authorities which we have cited. To us, those authorities seem decisive of the question at issue.

No amount of argument can remove from this case the great and all-controlling fact that long before Blake's insolvency had been dreamed of even by himself, the defendants, in the utmost good faith, in the performance of a contract which they had made, and in the legitimate and regular prosecution of their usual business, had advanced for the purpose of cutting the logs in controversy and getting them to their mill, the sum of over seventy-seven thousand dollars. Whether they shall lose this large fortune, is the question involved in this case.

Having thus honestly and legitimately made the advance which they had agreed to make, having in their possession the logs, which, but for those advances would never have been cut, it is insisted that they should have stopped midway in their enterprise and have delivered over to Blake's other creditors all this property, which they had never contributed a dollar to bring into existence, that they should not, because misfortunes had overtaken Blake, for which they were in no degree responsible,

be permitted to proceed under their contract according to its terms, and realize from the property the benefits which they were entitled to receive under it. The plaintiff's counsel has much to say with reference to what he calls the "spirit of the "bankrupt law," and claims that its leading purpose is to secure an equal distribution of the bankrupt's property among his creditors. Such, undoubtedly, is one of its leading purposes, but it was intended to distribute the *bankrupt's* property, and not the property of those with whom he had had dealings.

We make no objection to the equal distribution of all Blake's property among his creditors, but the defendants do most seriously object to taking *their* property and distributing it among Blake's creditors, equally or otherwise. If it is to be distributed at all, the defendants much prefer that it should be in payment of their own debts.

It is not the spirit of the bankrupt law to violate or abrogate the valid contracts of the bankrupt. It was not intended to relieve him from the performance of obligations which he had fairly assumed, where such performance was possible. To enforce the rule insisted upon by the plaintiff in this case, would be to introduce into all business transactions such elements of uncertainty and hazard as seriously to affect the freedom and safety of all business operations.

If rights of property honestly acquired and paid for when the bankrupt was apparently, and in fact, in flourishing and prosperous circumstances, were to be swept away the moment that misfortune overtook him, evils would result infinitely more serious in their character than those which the bankrupt act was designed to remedy. It is enough to say that the courts hold differently; that they not only protect rights thus acquired, but justify the bankrupt in securing them to the party entitled to enjoy them, even after bankruptcy. We ask nothing more in this case, and are confident we shall receive nothing less; and confidently believing that the defendants had a clear, legal and equitable right to the logs in controversy, to saw them into lumber, to sell the lumber and to appropriate to their own use the

proceeds of such sales, for their re-payment, we respectfully ask in their behalf that the judgment of the Circuit Court in their favor be affirmed.

Respectfully submitted.

EMERY A. STORRS,

Counsel for Defendants in Error.

CHICAGO, Oct. 8, 1874.